

No. 15677 ✓

United States
Court of Appeals
for the Ninth Circuit

FRANK REINER,

Appellant,

vs.

NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

FEB 18 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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state transportation and commerce, and that plaintiff was employed by defendant as its servant and employee, and as such, was working and engaged in interstate transportation and commerce at the time of receiving his injuries, and was working in the furtherance of interstate commerce and in work which directly, closely and substantially affected the general interstate commerce carried on by said defendant as a railway common carrier of passengers and freight for hire.

IV.

That on or about the 6th day of February, 1955, plaintiff was in the employ of the defendant as a Pilot Herder, and was engaging in the course and scope of his employment for the defendant in piloting a two-unit diesel locomotive which was owned by the Southern Pacific Railroad Company, and which locomotive was being operated, managed and controlled by the defendant, Northern Pacific Terminal Company of Oregon, its agents, servants and employees; that during the course of plaintiff's work, said diesel was moved from the passenger station at Portland, Oregon, to the Lake Yard where it was serviced and turned around, whereupon it proceeded to the vicinity of 17th Street in said city where it was brought to a stop on the inbound main line at which time plaintiff was engaged in the cab of the trailing unit of said locomotive and while he was so engaging the defendant, its agents, servants and employees negligently, carelessly and without notice or warning to plaintiff suddenly

started and backed said locomotive and propelled it at a high rate of speed in reverse movement on said inbound main line track and thereby caused it to violently collide with a cut of cars which were in the process of being switched from the adjacent outbound main line track and through a cross-over and onto said inbound main line track and causing said cars to be derailed and collide with an electric power line pole carrying high voltage wires and thereby plaintiff was placed in imminent peril to his life and limb and to avoid such peril plaintiff jumped from said locomotive to the ground thereby sustaining serious and permanent injuries as herein-after set forth.

V.

Plaintiff further alleges that the aforesaid occurrence and the resulting injuries to plaintiff were directly and proximately caused or contributed to by the negligence of the defendant, its agents, servants and employees other than the plaintiff as hereinbefore alleged and in one or more of the following additional particulars:

(a) That the defendant negligently operated and propelled said locomotive in reverse movement on said track at a high and dangerous rate of speed contrary to and in violation of the rules, customs and practices then and there in force and effect.

(b) That the defendant negligently moved and operated said locomotive in reverse move-

ment without timely or adequate warning to plaintiff of its intentions so to do.

(c) That the defendant negligently moved said locomotive at a high, dangerous and excessive rate of speed, without having it under control and without keeping a proper lookout and with disregard for the safety of plaintiff.

(d) That the defendant negligently moved said locomotive on said track in violation of the rules, customs and practices then and there in force and effect.

(e) That the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place to work.

(f) That the defendant negligently failed to adopt and enforce a reasonably safe plan and method of performing said work.

VI.

That by reason of defendant's negligence as hereinbefore alleged, plaintiff was severely and permanently injured about his entire body; that among the injuries he received the bones, vertebrae, intervertebral discs, muscles, tissues, nerves and ligaments of his back and spine were injured and on or about October 4, 1955, was required to submit to surgery in an attempt to alleviate said injuries; his left hip and left knee were injured; he suffered a post-traumatic pulmonary embolus; his chest and in-

ternal organs were injured and shocked and he was made sick, sore, lame and permanently disabled.

VII.

That in an effort to relieve and heal himself of said injuries plaintiff has been compelled to expend a considerable sum of money for medical, hospital, nursing care, etc., and in the future will be compelled to spend a considerable sum of money for said purposes, the exact amount of which cannot be definitely determined at this time.

VIII.

That by reason of the facts hereinbefore alleged, plaintiff has suffered and sustained at the hands of defendant damages in the sum of Eighty-Five Thousand Dollars (\$85,000.00).

Wherefore, plaintiff demands judgment against the defendant for the sum of Eighty-Five Thousand Dollars (\$85,000.00), together with his costs and disbursements herein.

/s/ OWEN A. JOHNSON,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed October 31, 1956.

[Title of District Court and Cause.]

ANSWER

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant denies each and every, all and singular, generally and specifically, the allegations contained in plaintiff's complaint and each and every part thereof and the whole thereof, and specifically denies that it was guilty of negligence in any particular as charged or at all or that any act or omission on its part whether alleged or not constituted a proximate or other cause of the accident described in the complaint herein, and specifically denies that plaintiff has been generally damaged in the sum of \$85,000.00, or in any other sum or sums whatsoever, or at all, except defendant admits:

I.

Defendant is an Oregon corporation engaged as a common carrier.

II.

On or about the 6th day of February, 1955, plaintiff was employed by defendant as a Pilot Herder and on said date received an injury.

Third Defense

Plaintiff was guilty of negligence constituting the sole, proximate, contributing and concurring cause of his injury.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff take nothing thereby.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed November 7, 1956.

[Title of District Court and Cause.]

SUPPLEMENT TO COMPLAINT

Comes now plaintiff, and permission of the Court having been obtained, amends Paragraph IV of his complaint by striking lines 22 through 25 on page 2 of said complaint and substituting for said struck portion the following:

“And thereby plaintiff was caused to be thrown violently against the parts of the cab of said locomotive and injured, and because of said derailment and collision he was placed in imminent peril of his life and limb and to avoid such peril, plaintiff jumped from said locomotive to the ground, thereby

sustaining further injuries, all of which injuries are of a serious, painful and permanent nature.”

BAILEY, LEZAK, SWINK &
GATES;

By /s/ SIDNEY I. LEZAK,
Of Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

MINUTE ORDER RE MOTION TO
STRIKE, ETC.
(January 21, 1957)

Motion to strike portion of oral testimony of Frank Reiner regarding pension and discipline for wreck and request for instruction to jury to that effect by plaintiff.

Order denying above motion.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find in favor of the defendant, Northern Pacific Terminal Company of Oregon.

Portland, Oregon, January 23, 1957.

/s/ HOLT W. BERNI,
Foreman of the Jury.

[Endorsed]: Filed January 23, 1957.

[Title of District Court and Cause.]

MINUTE ORDERS RE ENTRIES OF
VERDICT AND JUDGMENT
(January 23, 1957)

Order that Court's instructions go to the jury.

Order to enter verdict as returned for defendant.

Order to enter judgment on the verdict for defendant with costs.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff and moves this Court for an order setting aside the verdict of the jury and the judgment heretofore entered in the above-entitled cause and awarding the plaintiff a new trial for the following reasons:

1. The Court erred in refusing to instruct the jury as requested that the cause of the collision of February 6, 1955, was the negligence of the defendant in one or more of the particulars charged by the plaintiff.

2. The Court erred in refusing to instruct the jury as requested by plaintiff that medical witnesses were available equally to either party and that no adverse inference could be drawn from the failure of either party to call a medical witness.

3. The Court erred in failing to sustain plaintiff's objection to the question put by defendant's counsel to plaintiff as to whether or not plaintiff was drawing a pension from defendant company.

4. The Court erred in refusing to instruct the jury as requested by plaintiff that the receipt by plaintiff of a pension was immaterial to any issue in the cause.

5. The Court erred in permitting the defendant's counsel, both at the time of interrogation of the jurors and in argument, after objection, to comment on attorneys who were not actually participating in the trial of the cause before the jury.

6. The verdict of the jury was against the clear weight of the evidence.

7. The question asked by defendant's counsel of plaintiff as to whether plaintiff had been disciplined by defendant as a result of his part in the accident constituted misconduct on the part of counsel for defendant, which could not be cured by sustaining the objection to the question.

BAILEY, LEZAK, SWINK &
GATES;

By /s/ SIDNEY I. LEZAK,

Of Attorneys for Plaintiff.

In presenting argument on the above motion, plaintiff will rely on Chapter 45 U.S.C.A. §§51-60, Rule 59 of the Federal Rules of Civil Procedure and cases cited thereunder. The above motion is, in the opinion of the undersigned, well founded at law and not made for purposes of delay.

/s/ SIDNEY I. LEZAK,
Of Counsel for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 30, 1957.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S MOTION
FOR A NEW TRIAL

This cause having come before the Court for hearing on plaintiff's motion for a new trial, and the motion having been submitted for decision;

It Is Now Ordered that plaintiff's motion for a new trial is hereby denied.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.

June 21, 1957.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed June 24, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Frank Reiner, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment on the verdict for defendant with costs entered in this action on January 23, 1957.

/s/ OWEN A. JOHNSON,

/s/ EUGENE RERAT,

Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

No. 8874 (Civil)

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Frank Reiner, the plaintiff above named, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as Surety, are held and firmly bound unto the Northern Pacific Terminal Company of Oregon in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, for which sum well and truly to be paid, the undersigned Principal and Surety bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas, Frank Reiner, named above as Principal, has appealed or is about to appeal to the United States Court of Appeals for the Ninth Circuit from the judgment for the Defendant, above named, entered on January 23, 1957, in the above-entitled action, and

Whereas, as a condition to such appeal the Principal above named, Frank Reiner, is obligated to furnish this bond for the payment of costs in the sum of \$250.00.

Now, Therefore, if Frank Reiner shall well and truly pay all costs that may be awarded against him on the appeal or on the dismissal thereof, not exceeding the penalty of this bond in the aggregate, then this bond shall be void; otherwise to remain in full force and effect.

Signed, sealed, and dated this 3rd day of July, 1957.

/s/ FRANK REINER,
Principal.

[Seal] AMERICAN BONDING COM-
PANY OF BALTIMORE,

By /s/ ROBERT B. CUMMING,
Attorney-in-Fact and
Resident Agent.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT OF POINTS

Plaintiff herewith presents the Statement of Points upon appeal:

1. The Court erred in denying plaintiff's motion for a new trial.

2. The defendant railroad company was negligent as a matter of law for reason that the train movement was in violation of governing working rules and, further, that any contributory negligence that may have been attributed to plaintiff would only be in mitigation of damages rather than a complete and total defense.

3. The repeated questioning on behalf of defendant's attorney concerning an alleged but never established pension and plaintiff's retirement, which questioning was within the hearing of the jury, and, in addition, defendant's attorney's closing argument pertaining to said alleged pension and plaintiff's retirement were so prejudicial and inflammatory so as to deprive plaintiff of a fair trial.

4. The Court erred in failing to sustain plaintiff's objection to the questions put by defendant's counsel to plaintiff as to whether or not plaintiff was drawing a pension from defendant company.

5. The Court erred in refusing to instruct the jury as requested by plaintiff that the receipt by plaintiff of a pension and retirement was immaterial to any issue in the case, and the Court

further erred by submitting the issue of the company pension and plaintiff's retirement to the jury.

6. The repeated references and questioning on behalf of defendant's attorney regarding discipline of the plaintiff on behalf of defendant company and by repeated references and questioning pertaining to company's disciplinary proceedings constituted misconduct on the part of the attorney for the defendant, which resulted in such prejudice to the plaintiff which could not be cured by sustaining objections to said questions and as a result of which plaintiff was deprived of a fair trial.

7. The job classifications "pilot" and "pilot herder" and the responsibilities and duties attributable to each classification were used indiscriminately throughout the trial in such a manner so as to cause confusion as to what responsibilities should be attributed to the plaintiff in this action and so as to attribute a greater standard of responsibility to the plaintiff than was required of him in view of his employment as a "pilot herder" or "switchman." There is no evidence in the record that plaintiff was employed as a "pilot," as defined in the company rules.

8. The verdict of the jury was against the clear weight of the evidence.

9. The Court erred in permitting the attorney for the defendant, both at the time of interrogation of the jurors and in his closing argument, after objection on behalf of the plaintiff, to comment on the

attorneys who were not actually participating in the trial in the cause before the jury in such a manner so as to inflame the jury against the plaintiff with such resulting prejudice to the plaintiff that the plaintiff was deprived of a fair trial.

/s/ OWEN A. JOHNSON,

/s/ EUGENE R. RERAT,

Attorneys for Plaintiff, Frank
Reiner.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

ORDER OF TRANSMITTAL OF ORIGINAL EXHIBITS

This Matter having come on for hearing upon motion of the plaintiff for the transmittal to the United States Court of Appeals for the Ninth Circuit of exhibits in the above-entitled cause, and it appearing that a proper consideration of the issues raised on appeal requires the inspection of these exhibits in their original form, Now, Therefore,

It Is Ordered that the Clerk of this Court shall transmit to the United States Court of Appeals for the Ninth Circuit Exhibits 1, 2, 3, 4, 5, 13 and 21, to be safely kept by the Clerk of the Court of Appeals for the use of that Court in consideration of

this cause, and thereafter to be returned by him to this Court.

Done in Open Court this 25th day of July, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed July 25, 1957.

United States District Court,
District of Oregon
Civil No. 8874

FRANK REINER,

Plaintiff,

vs.

NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON,

Defendant.

Monday, January 21, 1957

Before: Honorable William C. Mathes, District
Judge, with a jury.

Appearances:

EUGENE RERAT,
OWEN A. JOHNSON, and
SIDNEY I. LEZAK,
Attorneys for Plaintiff.

JOHN GORDON GEARIN,
Of Attorneys for Defendant.

PARTIAL TRANSCRIPT OF PROCEEDINGS
(Opening Statements by Counsel)

(The jury having been duly empaneled and sworn and one alternate also having been duly sworn, the following proceedings were had:)

The Court: Ladies and Gentlemen, before proceeding with the case, I will excuse you for a brief recess while I take up some other matters, but before we separate I must admonish you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of the trial. You are not to form or express an opinion on the case until after it is finally submitted for your verdict. You are now excused for a five-minute recess.

(Jury retires for recess.)

(Trial resumed with jury in the box.)

The Court: In the case 8874 is it stipulated, Gentlemen, the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes.

We have some of the exhibits in the courtroom now, and probably Mr. Gearin would like an opportunity of looking at them. They are aerial views, two aerial views. There are also the pictures that we discussed before, your Honor, as to the damage that was done to the various parts of the cars involved in this accident. [*2]

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: Is there any objection on the part of defendant?

Mr. Gearin: I have not seen any picture of the wreck, your Honor. On Counsel's representation that this is the one, I guess that is it.

Mr. Rerat: Yes; there will be two witnesses here to identify that.

Mr. Gearin: Fine.

Mr. Rerat: These are the pictures of the place where the accident happened.

The Court: Have they been marked?

Mr. Rerat: They have not been marked as yet, your Honor.

The Court: Unless you identify them in the record, this record won't be very intelligible.

Mr. Rerat: I thought, your Honor, at the time that they would be offered, or do you identify them before? May I step up and get them, your Honor, and have them marked?

The Court: The Clerk will mark them. I would like to suggest that you have them marked as exhibits in the order in which you intend to present them. Where is the anatomical chart?

Mr. Rerat: Your Honor, it will be over here in just about five minutes.

The Court: I do not want anything to be brought in here [3] until I pass on it. I don't want the jury seeing any of these things until I pass on them. In fact, I am much more interested in that than I am some photographs of the railroad cars.

Mr. Rerat: Your Honor, that is why the chart will be here. It will not be displayed to the jury

until your Honor has had an opportunity, and Counsel, to check it over, and then if there is any objection Counsel can make it. Could I have this marked, then, Mr. Clerk?

The Court: Yes, the Clerk will mark them in the order in which you wish them marked, Mr. Rerat.

(Aerial photographs marked Plaintiff's Exhibits 1 and 2 for Identification.)

(Photographs marked Plaintiff's Exhibits 3, 4 and 5 for Identification.)

(X-rays marked Exhibits 6-A, -B, -C and -D for Identification.)

(Hospital Report marked Plaintiff's Exhibit 7 for Identification.)

The Court: In Case No. 8874, Gentlemen, is it stipulated the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor. [4]

The Court: Do you wish to make an opening statement to the jury, Mr. Rerat, on behalf of plaintiff?

Mr. Rerat: Yes, your Honor.

May it please the Court, Counsel, counsel for defendant, and you folks who have been selected to hear and try this matter, it is customary for the lawyer who represents the injured party in a case of this kind to make an opening statement, with only one view in mind, and that is to give you a mental picture of what the plaintiff's case is about

so you will be able to follow the testimony a little more closely.

We are here because of the fact that on the 6th day of February of 1955, where this accident happened near the street that will be designated as 17th Street and, I believe, in the locality of York Street, at that time the plaintiff, Frank Reiner, was working as a pilot-herder-switchman for the defendant railway company, the Northern Pacific Terminal, where the accident happened, a collision between an engine and a cut of cars. As a result of this accident the plaintiff, Frank Reiner, was very seriously injured.

You will find the facts further to be that Mr. Reiner at that time was a man 57 years of age. He lived at 2035 Ellis, Southeast. He had worked almost 35 years continuously for this railroad company. He went to work on the [5] day of the accident, February 6, 1955, about 3:30 in the afternoon. He was going to work from 3:30 in the afternoon until about 11:30 that evening. When he reported to work, he reported at his regular place where he reported every day at the Northern Pacific Terminal. He was going to work during that time as a pilot-herder-switchman with an engine crew made up of a hostler and his assistant, or what sometimes is called the engineer and the fireman.

It was his duty during the time he worked as pilot-herder-switchman to cut off the engines when they came—on passenger trains, when they came into the Northern Pacific Terminal. He was to cut these engines off. I use the term “cut off.” It means

to just uncouple, and then he would do the work of a switchman in connection with any opening and closing of switches or anything that was necessary like that when the engine would be taken from the terminal to the Lake yards. That is Guilds Lake yard, where the engine would be serviced. That, I believe, was about two miles out from where the terminal station was located. From 3:30 until approximately 8:00 o'clock on this particular day Mr. Reiner did his regular duties cutting off these engines, various engines, and then about 8:00 o'clock a Southern Pacific train came in, and this train had what is called a double-unit Diesel engine attached to it. So when the train came into the terminal it was uncoupled from the [6] rest of the cars by Mr. Frank Reiner. He got on the engine and went with the engineer. Of course, the engineer operates the engine, and the fireman also is in the cab of the engine, one on one side and one on the other. They took these two engines—it was a double-unit Diesel—the two units were taken down to the service yards at Guilds Lake. It took probably about a half-hour to forty-five minutes. Down there during that time the plaintiff, Frank Reiner, just waited. Then after the work was completed there the engine started out to return from Guilds Lake to the terminal. At that time the engineer or hostler, the man who operated the engine, was a man by the name of Myers. The fireman's name was Moore. There was also along on the return trip a boilermaker by the name of Bray, an electrician and a machinist. About a half mile from where the Lake yard service

station is located it is necessary for the switch to be operated so the movement can proceed onto the main line to the depot. From that point on there are two main lines, one that will be referred to in the testimony as the westbound main line and the eastbound main line. These two tracks ran in a generally northerly direction and a southerly direction. The track on the east side is the eastbound main line, and on the west is the westbound main line. Coming back from Guilds Lake yards the engines would proceed on the westbound main-line track, and, of course, leading off from [7] these two main-line tracks there are other tracks, what will be referred to as cross-over tracks. They started off from Guilds Lake yards at around a quarter to 9:00, and at that time Mr. Reiner, I believe, was riding in the front unit. These two units were back to back. That is the way they came in, and that is the way that they—after they were worked on in the service yards that is the way they started to the depot.

At the place where the accident—where the movement was going to go onto the main-line track Mr. Frank Reiner got off to operate the switch so the movement could be allowed on the westbound main track. He then got on the second unit and just sat in the, I believe in the cab, which the cab would be on the back end, or that would be on the north end, and the engine proceeded on the main-line westbound track towards the terminal station. After they had gone some distance to a point that will be described as 17th Street, there was a stop of these two units. The engineer in front stopped the units.

Now this was a sort of dismal night. It was rather misty at the time, and I believe it had been kind of drizzling for quite some time. When the unit stopped, Mr. Reiner gave no signal for any stop, knew nothing about what the stop was made for. All he knew was that the units had stopped.

In a few minutes the fireman, Mr. Moore, came back [8] to the second unit where Frank Reiner was sitting just by the engineer's seat, and he told him to get up from his seat, and as he got up, when he got up he noticed that Mr. Moore used the phone—there is a phone in the place where the engineer sits in the back—then immediately he gave the buzz three times, which meant for a back-up movement. That would be, instead of proceeding towards the terminal, to back up towards Guilds Lake yards.

The motors of these two Diesels had been going even when they were stopped so that after Mr. Moore had given the signal through buzzing the engineer, the unit went back with a sudden jerk, and it knocked Mr. Reiner off-balance a little, and then before he had a chance to do anything, had just about hollered to "Hold it," there was a sudden violent impact——

Mr. Gearin: Your Honor, may I object to Counsel's argument. In a case of this kind I think he has gone beyond the point of an ordinary opening statement.

The Court: The jury will understand that anything Counsel is saying to you now is not evidence at all in the case. I usually expect counsel somewhere, Mr. Rerat, to tell the jury that.

Mr. Rerat: Yes, your Honor.

The Court: And to preface their remarks by "We expect the evidence to show." What Counsel is saying to you, Ladies and Gentlemen of the Jury, you should put it in this light: [9] The plaintiff expects to prove; the plaintiff expects the evidence will show that these things are true. Nothing is being said to you as at all evidence in the case. It does not amount to anything as evidence in the case, just Counsel's talking to you about what he hopes to be able to prove in the case so that you will be able to follow it. The theory of the opening statement is that you will be better able to follow the evidence. I always think counsel would do much better to make those opening statements very brief.

Mr. Rerat: Thank you, your Honor.

We expect to prove by the evidence in this case that there was a violent impact between the second Diesel engine and the cut of cars, I believe about 35 cars, that was on the east track and had crossed over to the westbound track.

At the time of this impact Mr. Reiner was tossed around in the cab frontwards and backwards and then from side to side, and while the train—after the impact while the movement was proceeding the two trains were still bumping, and Mr. Reiner jumped out of the cab into a ditch.

The evidence will show that as a result of this impact and as a result of his jumping that he received injuries to his right knee, his left leg and knee, his hip and his back. The evidence will further

show that he was taken to the Good Samaritan Hospital; that he remained there [10] a short time. He was then taken home by his son. He remained home for quite some time, and he was under the care of the company doctor, a Dr. Mundal. The evidence will further show that he was taken to the hospital sometime a little later and that he was placed in traction, weights and things on both legs.

The Court: Just do not describe it. It will all be described to the jury, Mr. Rerat.

Mr. Rerat: Yes; thank you, your Honor. Furthermore, that later on there was an operation performed by the company doctors.

Now, the evidence will show that as a result of this accident Mr. Reiner suffered a great deal of pain during that time and that as a result of these injuries that he is permanently and totally disabled from performing the work that he had done for 34½ years.

That is substantially what the plaintiff's testimony will show. Thank you.

The Court: Mr. Gearin.

Mr. Gearin: If the Court please, Ladies and Gentlemen of the Jury, by this time you know there are two sides to every case.

Our evidence will show that there had been a rule promulgated against the men doing what they were doing at this time. A rule had been out just a few days in which the [11] plaintiff had been told that they were not to road-test these engines; that when he was in the back of the two units, as Mr. Rerat has told you, they went this way (indicating), and

then they backed up. According to the rules with, which the plaintiff was familiar, the evidence will show that he as a pilot-herder was in charge of the movement and that it was his obligation to see that it was done safely.

At a point four or six hundred feet from the point of the accident they came in on this track. The evidence will show that the other train, they call it a cut or break, and all that means is that the locomotive in the switchyard is taking a bunch of cars some place else—their instructions were to wait until this went by and they were to cross over, and that they started up, and at that time before they started Mr. Reiner knew that they were going to make a road test; that the evidence will show that Mr. Moore came back and did something about the headlight. They have headlights on both ends. Mr. Reiner told him to put the lamp on dim; that thereafter they started back a distance of from four to six hundred feet, at which time, the evidence will show, it was the obligation of the plaintiff to see that this was done safely.

The evidence will show that while he was in charge of the movement, due to his neglect an accident happened. After the accident happened Mr. Reiner jumped. He was the [12] only one in the cab of the three in the front end, he was the only one who did, and he is the only one who received injury.

After the accident there was a disciplinary hearing, about which you will hear more later on; that Mr. Reiner went back to work, and he complained

about his back, and the company doctor sent him to Dr. Carlson, a specialist in the field of orthopedics, who took care of him and did some work on his back. I think the testimony will be from Dr. Carlson, who has treated him and observed him, that the man is in good condition. The testimony, we believe, will be to the opposite by Dr. McMurray, likewise an orthopedist, who saw the plaintiff last week, I understand, for the first time only to prepare for trial.

Now, we ask you, please, when you hear this case to wait, please, until you hear our side of the case, to see who is responsible for the accident and the amount of, the nature and extent of the present injuries of the plaintiff who is seeking damages in this case. Thank you.

The Court: Plaintiff may call his first witness.

Mr. Rerat: Your Honor, I call the plaintiff as our first witness. [13]

FRANK REINER

plaintiff, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. Frank Reiner.

Q. Where do you live, Mr. Reiner?

A. 2035 Southeast Ellis Street.

Q. I am going to ask you to speak loud enough so all the jurors will hear you and counsel for the

(Testimony of Frank Reiner.)

railroad company on the other side will also hear you, please.

Will you tell us how old a man you are?

A. Fifty-nine.

Q. What was the date of your birth?

A. 1897, October 30th.

Q. On February 6, 1955, were you injured in a railroad accident? A. Yes, sir.

Q. At that time by whom were you employed?

A. By the Northern Pacific Terminal Company.

Q. How long had you been employed by the Northern Pacific Terminal Company prior to February 6, 1955?

A. Since the 20th of May, 1921.

Q. So that was almost 35 years?

A. Just about 35.

Q. Was that service of 35 years continuous?

A. Yes.

Q. Where did this accident happen on February 6th?

A. What is known as the westward main line of York Street cross-over switch.

Q. Will you tell us about what time of the day or night it happened?

A. It was just about around 9:15 p.m.

Q. At the time that this accident happened, what kind of work were you doing for that Northern Pacific Terminal Company? A. Pilot herder.

Q. During the 35 years that you had worked for the company, when you first started in what kind of work did you start in doing?

(Testimony of Frank Reiner.)

A. Switchman.

Q. Then how long before the 6th of February of 1955, did you do the work of pilot-herder?

A. Oh, about four years or better.

Q. What time did you go to work on this particular day? A. 3:30 p.m.

Q. For how long have you lived in the City of Portland, Mr. Reiner?

A. In Portland, 36 years in May. It was 36 years last May. [2*]

Q. You say you went to work at 3:30 in the afternoon that day? A. Yes.

Q. Where did you report to work at?

A. At the depot yard office.

Q. You were going to work from 3:30 on until approximately what time? A. 11:30 p.m.

Q. Between 3:30 in the afternoon and 8:00 o'clock that night, where did you do most of your work?

A. At the Union Depot cutting off engines and tying on passenger engines.

Q. Will you tell us first what are the duties of a railroad switchman? A. Switchman?

Q. Yes.

A. Well, that is switching cars in the yard, placing them on one track or another; sorting them; placing of trains.

Q. Do you have any duties in connection with opening and closing knuckles? A. Yes.

Q. Anything else?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Frank Reiner.)

A. Well, we have to set brakes, go up high on the boxcars, set brakes.

Q. Will you tell us what the duties are of a pilot-herder-switchman? [3]

A. It is to cut off the engines on these passenger trains when they come in the depot; also to couple them onto the passenger trains for the trains that is to go out, and if there is any engines that has to be serviced, you take them out to Guilds Lake there on the service track, and it is my, the pilot's duty to line the switches and such as that.

Q. Is this work considered light or heavy work?

A. Yes, it is heavy; it is heavy.

Q. In working in your duties on that particular day as pilot-herder did you work with some individuals who operated the train?

A. Yes, I did.

Q. Will you tell us the man's name that was the engineer, the man who operated the engine?

A. The engineer's name was Mayers.

Q. Will you tell us the name of the fireman?

A. The fireman's name was Moore.

Q. As a pilot-herder-switchman, do you have any duties of any kind in connection with the operation of that engine mechanically in any way?

A. No, sir.

Q. Or are you allowed to touch any part of the mechanism of that engine to work it?

A. No, sir. [4]

Q. About 8:00 o'clock that evening, that is, the

(Testimony of Frank Reiner.)

evening of February 6, 1955, did a Southern Pacific train come into the depot?

A. Yes, sir.

Q. When it came in, what did you do?

A. I uncoupled the train and got on with the engineer and fireman in front, and we proceeded to the Guilds Lake yards, and there placed the engine on a service track where they were serviced.

Q. Mr. Reiner, tell us the approximate distance from the terminal where the train was cut off to the Guilds Lake yard.

A. It is about, I would say, two miles; maybe a little bit better.

Q. Will you tell us what kind of locomotive engine or engines did you cut off this one Pacific train about 8:00 o'clock that night?

A. Diesel unit, two units, Diesel.

Q. When you cut them off and when you took them to Guilds Lake yard, will you tell us how they were connected together?

A. They were back-to-back. In other words, there was a cab on each end, and they can be operated from either end, but they was back-to-back. That is the way they were.

Q. The two units then were together, and you went with the—you got in the units with the fireman and engineer. Are they sometimes called another name? Are they called [5] another name besides engineer and fireman?

A. Hostler and hostler helper.

(Testimony of Frank Reiner.)

Q. When you proceeded from the terminal to the Guilds Lake, on what side would the engineer be?

A. On the right side.

Q. On the right side? A. Yes, sir.

Q. On what side would the fireman or hostler helper be? A. On the left side.

Q. Going down to the Guilds Lake yard from the depot that evening, did you have any duties as far as opening and closing a switch or anything like that, on the way down, Mr. Reiner?

A. Except at the yards after we got out there, to line switches, to put them on the service track.

Q. Then after the engine or the two units arrived at Guilds Lake yard, what was done with those units?

A. Well, they serviced them there, wash them, put oil in there, and machinists and electricians work on them and fix them up ready to go back out again.

Q. Mr. Reiner, do you have any duties of any kind in connection with the engine when it was in the Guilds Lake Yard? A. No.

Q. Well then, after it was there for awhile did they start out then to return to the depot? [6]

A. Yes.

Q. About what time was it that this, that you started out from Guilds Lake Yard to return to the depot?

A. It was about around 9:00 o'clock, I would say, or shortly before.

Q. From the depot to the Guilds Lake Yards

(Testimony of Frank Reiner.)

are there two main-line tracks? A. Yes.

Q. Will you tell us how these main-line tracks are designated, please?

A. Eastward main and westward main line.

Q. When you left the terminal to go out to the yards, what track did you go out on?

A. We went out on eastward main.

Q. Then coming back you would come back on what track?

A. On the westward main, main line.

Q. These tracks run in what general direction?

A. Northerly and southerly at this——

Q. After you had left the yard for some distance, did you do anything about the switches to bring the movement on the main-line track?

A. Yes, about a half mile from where we started at the Guilds Lake Yard there until we hit the main line is about a half mile, there is a switch that I have to throw to let the engines, these Diesels, onto the main line. [7]

Q. When you started out from Guilds Lake Yards, who was the man operating the engine in the front? A. Meyers, Engineer Meyers.

Q. And the fireman, Mr. Moore, the same two as you went out? A. The same two I went out.

Q. Besides Mr. Meyers, Mr. Moore, and yourself, will you tell us whether or not there was anybody else in the two units with you?

A. There was an electrician and a machinist and a boilermaker.

Q. After you had thrown the switch so the move-

(Testimony of Frank Reiner.)

ment could proceed on the western main track back to the depot, where did you then go?

A. I was on the trailing unit in the cab, in the rear end.

Q. After you got in there, was there anybody else in there besides you?

A. Yes, there was the boilermaker. He was sitting on the—which would be the fireman's seat on this end where I was at.

Q. What was his name, if you remember?

A. Bray.

Q. Bray. Then as you proceeded then on the main-line track after the work, opening, or whatever you did to this switch, then what else, if anything, happened before you got to the terminal? [8]

A. Well, just before we got to the 17th Street cross-over the engines, these Diesels, they come to a stop.

Q. Did you give any signal for a stop?

A. No, I didn't.

Q. Did you know these engines were going to stop?

A. No, I didn't.

Q. Were you told at any time?

A. No, sir.

Q. That they were going to stop?

A. No, sir.

Q. Then when they stopped what was the next thing that you observed?

A. That Fireman Moore, he come to the rear through the inside of these engines, and he says to me, "Get off of the seat, Frank." I immediately

(Testimony of Frank Reiner.)

got off. I says to him, "What is the matter now?" He says, "There is something that we want to try out, and we might even have to go to the Lake Yard."

Q. What happened then?

A. Well, he picked up the phone and was talking to the engineer or whoever he was talking to on the other end, I don't know, and then he turned on the light and pressed a button three times, and the engine commenced to go back with a lurch, and I either did say, I tried to say, "Hold her," or did say it, I don't know, and the next thing I [9] knew, why, in a few seconds, why, we hit and come to a violent collision with some cars on the main line.

Q. Mr. Reiner, will you tell us that particular time and for some time before you left the Guilds Lake Yard what kind of an evening was this?

A. It was a drizzly rain.

Q. When you left the depot—or that would be the terminal—did you do anything else about any lights as far as a second unit was concerned?

A. Yes, it is my duty to put on two red lights on the rear end of these trains as it would be just like on a train rear end.

Q. Those red lights remained on the, that would be the second Diesel, the hind Diesel, for how long?

A. They remain there until, from the time you leave the terminal until you get back again to the Union Depot.

Q. Do you have any duties of any kind with the operation of the light on the engine that is used

(Testimony of Frank Reiner.)

for the fireman and engineer to see up in front, that big headlight?

A. No, I have nothing to do with it.

Q. But you did see Mr. Moore turn that on, you say? A. Yes.

Q. Was there anything said by him at that time or by——

A. Well, he says, “Are they on bright?” And as the windows was so dirty and raining, you couldn’t tell whether the lights [10] was on bright or dim, and I said, “Dim.”

Q. As Moore gave these three buzzer signals, that meant what? A. To back up.

Q. Did he tell you before that or when you were at the terminal or when you were at Guilds Lake or any place before Mr. Moore started to buzz three times, did you know anything about any back-up movement? A. No, sir; I did not.

Q. While the units were standing there after—when they stopped did—will you tell us whether the engines were going at that time?

A. Yes, these motors, they run just the same while they are standing as if they were running. They are going continuously.

Q. How long after the third buzz did the movement start back? A. Just immediately.

Q. And when it started back, what happened to you at that time?

A. Well, it kind of threw me off my balance, and by the time I got my eyes up, I looked at the

(Testimony of Frank Reiner.)

window, I was going to say, "Hold her," or did say—I was already saying, "Hold her," and it was just a matter of seconds that it took, why, we went into this collision with the other train. [11]

Q. Now, under those conditions, Mr. Reiner, is such a movement a safe movement?

A. No, because it was making a movement against the current of traffic which is not practicable or practical or is never made.

Q. If you were informed by either Mr. Moore or by Mr. Meyers, the engineer, that they wanted to make a back-up movement like what was made at that time, what was the custom and practice to be followed by you or any other pilot herder?

A. Well, the only way it could be made on a main line would have to be to have a train order and go back and flag, send a man back on the main line to protect against other trains which would be coming and might be coming at any time, which they was there all the time, keep coming from the other way. You have to have somebody there to flag, to flag the movement.

Q. Would you have to have permission from anybody to make such a movement?

A. Yes, you would have to have permission from either the Yardmaster, which would be in our case, there is no trainmaster there, or the operator have a train order or something. He should have something.

Q. How would that have been done by you?

A. I would not have made that move under no

(Testimony of Frank Reiner.)

conditions that way. If they had wanted to have gone back, I would cross over onto the other eastern main line, and we would have went back [12] that way, which was the proper way to have went.

Q. Were you familiar with the bulletin that was put out by the Terminal Company on February 2, 1955, on such movements?

A. That was not in our department.

Q. Was there a bulletin put out?

A. There was.

Q. Against making such a move?

A. Making such a move.

Mr. Gearin: Counsel, may I correct you?

The Court: I cannot hear you.

Mr. Gearin: I was calling counsel's attention, I think he misspoke himself. I think that is Bulletin 69.

Mr. Rerat: Bulletin 69, yes, that is correct.

Q. Now, Mr. Reiner, at the time of this impact what was the approximate speed of the units at the time of the impact, would you say?

A. I would have said it was between 25 to 30 miles an hour.

Q. And the distance that was traveled from the time that you started up to the time of the impact was approximately what?

A. About twelve boxcar lengths.

Q. When you say twelve boxcar lengths, you have in mind a boxcar being about how long?

A. Forty feet. [13]

Q. So that would be about 480 feet?

(Testimony of Frank Reiner.)

A. Yes.

Q. Approximately? A. Yes.

Q. After the three buzzes were given by the fireman and the engineer started up in the manner that he did, was there anything that you could have done to have prevented that movement?

Mr. Gearin: Object to the form of the question, your Honor.

The Court: Sustained.

Q. (By Mr. Rerat): Under the circumstances as existed at that particular time, would you say that—and from the time the movement started up to the time that the impact took place when you say you first knew about this, how much time elapsed, approximately?

A. It was just a matter of seconds, just seconds.

Q. When the impact happened, that is, the engine came in contact with something else, did you find out what it came in contact with?

A. Yes.

Q. What was it?

A. With another train or cars that were crossing over from the eastward main to the westward main.

Q. Mr. Reiner, when your engine stopped at the place you [14] stated it did on 17th Street, will you tell us whether there was a cut of cars on the east-bound main? A. Yes, there was.

Q. Did you have anything to do with those cars?

A. No, I did not.

Q. Did you know where they were going or what movement was to be made or anything else?

(Testimony of Frank Reiner.)

A. No, I did not.

Q. Will you tell us the distance between the westbound main and the eastbound main?

A. Oh, it's approximately about 40 feet across from one track to the other; right in there, I imagine, was about right.

Q. At the time of the impact, will you tell us just what happened to you?

A. Well, when they hit it hit with such force that it kind of dazed me, threw me forward, backward, right side and to the left side, and my body parts hit different parts in the engine there, which hurt me all over in different places, and everything was, looked like it was on fire, so I opened the door, and my one thought was to get away from this fire and to get out of there, and the engines seemed like they was leaning to this one side, and I knew I couldn't get out of the other side so I opened the door, and my idea was to jump and jump as far as I could to get away from the [15] fire and the engine and also from them falling on me if they were off the track—it looked as though they were—and I jumped out.

Q. Did you jump then—on what side would you say you jumped out?

A. On the left side.

Q. Would that be on the west side?

A. That would be on the west side.

Q. When you were knocked forward, backwards, and side-to-side, were you knocked unconscious at that time or not, first impact?

(Testimony of Frank Reiner.)

A. I was dazed and shocked. I didn't, I wasn't altogether.

The Court: We will take the noon recess at this time until 2:00 o'clock.

Before we separate, I again must admonish you that it is your duty, Ladies and Gentlemen, not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this trial and not to form or express an opinion on the case until after it has been finally submitted to you for your verdict. You are now excused until 2:00 o'clock this afternoon.

(Noon recess taken.) [16]

AFTERNOON SESSION

(Pursuant to noon recess the proceedings were resumed at 2:00 p.m.)

The Court: You may proceed, the plaintiff was on the stand, I believe.

Mr. Rerat: Yes, your Honor. Will you take the stand, please?

Your Honor, I want to apologize for not standing when I was asking the witness questions just before lunch. I didn't know that was the practice.

The Court: That is quite all right, you have a very good voice, he can hear you very well.

Mr. Rerat: Well, thank you.

Do you have the last question and answer, please?

(Whereupon the preceding questions and answers were read as follows: "Question: Did you

(Testimony of Frank Reiner.)

jump then; on what side would you say you jumped? Answer: On the left side. Question: That would be on the west side? Answer: That would be on the west side. Question: When you were knocked forward, backward, side-to-side, were you knocked unconscious at that time or not—first impact? Answer: I was dazed and shocked. I didn't—I wasn't out altogether.'')

Direct Examination

(Continued)

By Mr. Rerat:

Q. Now, counsel mentioned this morning about Bulletin 69. After this accident happened on February the 6th of 1955, did you become aware that there was a Bulletin 69?

A. Yes, at the investigation.

Q. And was that—will you tell us what Bulletin 69 had reference to?

A. That was reference to the engineers and firemen, they were not to make any test runs on these S. P. Diesel locomotives any more on the main line.

Q. Now, was such a bulletin issued to you as a pilot-herder switchman at any time?

A. No, sir.

Q. And did the power testing that the Bulletin had reference to, did that have anything to do with any of your duties or work with this railroad company?

A. No, sir.

Q. And when such a bulletin is issued, you said it was issued to the firemen and engineers, would

(Testimony of Frank Reiner.)

it be issued in a place where you would be able to see it; it would be put up? A. No, sir.

Q. Now, as a result of you being pushed from one end, or one side to the other in the cab of the locomotive that you were in at the time of the impact, and side-to-side movement, [18] and then you said you jumped as a result of this accident, what injuries, if any, did you receive?

A. My left leg and knee and hip and back and my right leg.

Q. Now Mr. Reiner, there has been marked Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2, which are aerial views of the scene where this accident happened. Now, I'd like to offer in evidence at this time Plaintiff's Exhibits 1 and 2, and I understand there is no objection?

Mr. Gearin: I have only seen 1.

Mr. Rerat: Oh, excuse me, the other one is practically the same.

Mr. Gearin: They are both here and they are the same, I don't think I have any objection to either, your Honor.

The Court: Is it stipulated that each of them fairly depicts what it purports to be in reference to the scene of the occurrence?

Mr. Gearin: Yes.

Mr. Rerat: Now your Honor, I could have Mr. Reiner have the exhibit placed here so he could explain to the jury the direction of the tracks.

The Court: Yes, the plaintiff may place it wherever you wish.

(Testimony of Frank Reiner.)

Q. (By Mr. Rerat): Now Mr. Reiner, will you step down here, please? Mr. Reiner, will you first show us what direction is north on Plaintiff's Exhibit 1? [19]

A. This main line here (indicating) is north.

Q. That would be the top of the aerial view; is that correct; and the south would be the bottom?

A. Would be this one here (indicating).

Q. And to the right would be east, then?

A. East.

Q. And to the left would be west?

A. This way (indicating).

Q. Right. Now, you have referred and talked about the west main-line track. Will you show us on Plaintiff's Exhibit 1 where the west main-line track is located; do you have a colored pencil? I have one here, I don't know whether it would work or not. Now, will you mark on the west-bound main-line track, will you put west main or W.M.1, showing us where the——

A. W.M.1——

Q. And will you take the pencil and mark E.M.1 for the east-bound main line?

A. East-bound 1.

Q. Then, will you take the red pencil and will you mark at the approximate position that the unit that you were riding in, the two Diesel engines when you came from Guilds Lake Yards and the stop was made at, you said at a place you said was 17th Street, I believe, or around there, would you show us—can you show us on this? [20]

(Testimony of Frank Reiner.)

A. Right here (indicating).

Q. All right. Now, will you draw a line right across the west-bound track, and will you put that F.R.1? A. This way?

Q. Yes. Now, will you show us the approximate position where the cut of cars was located on the east-bound main-line track when your unit stopped at the place you have designated as F.R.1?

A. The engines from the other train was right here (indicating).

Q. All right. Now, will you——

A. And the cars was here (indicating). The train, the whole train was sitting on the main line back this way (indicating).

Q. Now, will you draw another line on the east-bound main-line track and show us where the approximate place of the engine of the cut of cars that was on that east-bound track was located, and put an X.F.R.2 or 3, rather, that would be, wouldn't it?

Mr. Gearin: No. 2.

Mr. Rerat: All right. Now, would you at the place you have designated as F.R.2—is there a cross-over switch or cross-over track from the east-bound main line to the west-bound main line?

A. Yes. [21]

Q. All right. Will you just draw that in red pencil, showing the cross-over track? Just draw a line with your red pencil.

A. All the way up?

Q. Yes. Now, will you tell us where the impact

(Testimony of Frank Reiner.)

took place between the unit you were on and the cut of cars that it ran into?

A. Right there (indicating).

Q. And will you just mark an X there, please, at the approximate—and put that X.F.R.3. Now Mr. Reiner, you stated that you saw a blaze, everything seemed to be afire. Did you find out later what had caused that blaze or that fire?

A. Yes. When we—when these engines that I were on hit here (indicating) and knocked—took part of one car off—knocked—I think it was two of them off over here (indicating), there is a telephone pole over here (indicating) with some high—with some transformers here (indicating) and it broke the pole and that put everything on fire up there. Everything was hanging, however, I don't think the wire was broke. It just throwed flame that you could see all over the City of Portland.

Q. Now, you were in the vicinity of where the impact took place between these two cars, that is the engines and the cut of cars, did you see a man from the other crew; that would be from the crew that had been on the east-bound main-line track; do you remember seeing anybody there?

A. Yes, after I got up and we got back over here (indicating) there was—I seen a man coming from here (indicating) from the other engine here (indicating), coming down this way (indicating).

Q. Now Mr. Reiner—your Honor, at this time, the plaintiff would like to offer in evidence Plaintiff's Exhibits 3, 4 and 5.

(Testimony of Frank Reiner.)

Mr. Gearin: No objection.

The Court: Received in evidence.

(Plaintiff's Exhibits 3, 4, and 5, heretofore marked for identification, were thereupon received in evidence.)

Q. (By Mr. Rerat): Now, showing you Plaintiff's Exhibit 3, Mr. Reiner, will you tell us what that is?

A. That is the Southern Pacific Diesel unit engine.

Q. Is that one of the units that you were——

A. Yes, that's the unit I was in.

Q. And showing you Plaintiff's Exhibit 4, will you tell us what that is?

A. That's after that end you see there went by, and took off part of a boxcar from this other train, and strew all the pieces and everything all over the engine. There was steel flying all directions, and fire, and this here (indicating) is the telephone pole that was broke off where these [23] transformers was on, which throwed the flame. Here are the wheels from the first boxcar, I think it was.

Q. And showing you Plaintiff's Exhibit 5, will you tell us what that is?

A. Well, that's also part of the wreck there, and the car, part of the car that was in it, wheels from some of the tanks that was completely throwed off of the track.

Q. You may be seated now, please. Now, when you jumped from the engine, when you saw that fire,

(Testimony of Frank Reiner.)

the engine stopped—or was it moving, that you were on? A. They were still moving.

Q. Now, did you observe afterwards what part of the cut of cars that had been on the east-bound main-line track collided with the back end of your engine? In other words, how far back from the engine was the impact?

A. I'd say—I couldn't just exactly say—about five or six cars, six—seven cars in there.

Q. Now, we noticed that the cross-over track from the east-bound main track to the west-bound main track, when the east-bound main track had been changed by the switch, that opens the track leading off from that to the track on the west-bound main-line track. If the track is lined up from the east to the west-bound main-line track, is there a switch stand that shows a green or a red sign?

A. Yes. [24]

Q. And if the track extending from the east-bound main-line track to the west-bound main-line track is lined up, then what color would be the switch that would be on the other side, on the west side of the west-bound main track at that point; what—would it be green or red? A. Red.

Q. Red, and red would indicate to anybody, what?

A. That the track was not clear, the switch was wrong.

Q. Now Mr. Reiner, this morning you said that if you had been told by the engineer that he wanted

(Testimony of Frank Reiner.)

to make a left or a backward movement, that you would have gotten down from the engine and walked in back of the engine down towards that cross-over track, and why would you have done that?

A. To protect the inbound or traffic on the main line from the north.

Q. And is that the customary and usual way of doing that work?

A. Well, no, you wouldn't do it. Usually, this move is never made, but that would be the only possible way it could be made.

Q. In case of necessity?

A. Of necessity.

Q. Now, what part of your person came in contact with the ground that you landed on?

A. How is that? [25]

Q. What part of your person came in contact with the ground? In other words, how did you fall and what did you fall on?

A. I tried to jump as far as I could, and I landed on my left foot, and with the force and the height, I fell—rolled over, kind of on my left side and I tried to—just crawled or anything—just to get away from the accident there because I didn't know but what the engine was going to fall over on top of me.

Q. Were you suffering pain at that time?

A. Yes.

Q. Where?

A. My leg and knee and hip and back.

(Testimony of Frank Reiner.)

Q. Where was the pain the worst?

A. Well, the worst was in my leg.

Q. Well then, after the impact and the cars came to rest, then were you taken any place from the scene of the accident? A. Yes.

Q. Where were you taken to?

A. To the Northern Pacific Terminal Company yard office.

Q. And how were you taken from the scene of the accident to the terminal office?

A. By another S.P.&S. switchman in his car.

Q. Well, then, when you arrived at the terminal office there, what was done for you?

A. After I sat around there for quite awhile waiting for [26] the general yardmaster, he was to come, he was to haul me to the hospital because he—as he did not show up, why, the boys in there they had my son take me.

Q. Well, is your son—was your son working for the railroad company at that time? A. Yes.

Q. What does he do? A. He is a clerk.

Q. And he was working there at that time?

A. Yes.

Q. And he is still working for them; is that right? A. (Witness nods head.)

Q. What hospital did he take you to?

A. The Good Samaritan.

Q. Good Samaritan Hospital. Now, when you arrived there, will you state just what was done for you at the Good Samaritan Hospital?

(Testimony of Frank Reiner.)

A. Well, they—the intern X-rayed my knee, my leg.

Q. And you were just—you said that you were treated by a regular doctor or just by an intern there? A. Just an intern.

Q. And after you were given first aid, where were you taken to?

A. Well, they—the main doctor wasn't there so this guy didn't seem to think it was so serious, they sent me home. [27]

Q. Well then, when you arrived at home, who was at home when you reached there?

A. My wife.

Q. Then what was done with you at home?

A. Well, I was put to bed.

Q. Then will you tell us what kind of a night you put in that first night?

A. Well, a very bad one it was.

Q. Were you suffering pain?

A. Yes, very bad.

Q. Were you suffering pain? A. Yes.

Q. Where?

A. My leg, my hip, my back.

Q. Now, the next day, that would be on February the 7th, what was done the next day; did you call a doctor or what did you do?

A. Well, I had been told to come up to the doctor's office, but I couldn't even get out of bed. So the wife, she called the doctor and told him it was impossible for me to come up there.

Q. What doctor was that?

(Testimony of Frank Reiner.)

A. Dr. Mundal.

Q. And he is a company doctor, is he, for the Northern Pacific Terminal Company? [28]

A. Yes.

Q. Did Dr. Mundal come out that day?

A. No.

Q. When did he come out then?

A. He didn't come out until the 10th of February.

Q. Well, during that time what—were you in bed? A. Yes.

Q. And who was taking care of you?

A. My wife.

Q. Now did Dr. Mundal give her instructions over the telephone as to what to do for you?

A. Yes.

Q. And will you tell us just what your wife did during this period?

A. Well, she was instructed to put hot towels on my knee and leg and hot pads on my back, and, well—she didn't have anything else so she just gave me Anacins.

Q. Well now, at that time what did you observe about your left leg, if anything, that is, the first night at home?

A. Well, it was swelling up and whenever I would try to sit up or get out of the bed to go to the bathroom, it would turn black-and-blue and swelling pretty bad and pained severely.

Q. Well now, how did you get around from your

(Testimony of Frank Reiner.)

bed to the bathroom, between the 6th and the 10th when the doctor arrived? [29]

A. With crutches and the help of the wife.

Q. Did you have a pair of crutches at your home? A. Yes.

Q. Now, the 10th when Dr. Mundal came, will you tell us just what he did, and just what treatment he prescribed for you?

A. Well, he came on the 10th, and after he seen my leg, and——

Mr. Gearin: Just a moment, I object on the grounds that it is hearsay. The doctor is available as a witness if called.

Mr. Rerat: Now just a minute, do you mean you object?

The Court: Direct your remarks to the Court.

Mr. Rerat: Yes, your Honor, well——

The Court: Instruct the witness not to——

Mr. Rerat: Yes, not to testify, not to testify saying anything, any conversation between you and the doctor, see, but did the doctor check you over?

The Witness: Yes.

Q. (By Mr. Rerat): All right. Then what — that was on the 10th, was it? A. Yes.

Q. Then what followed on the 10th after the doctor was there?

A. Well, just still kept putting hot packs and the same [30] procedure as before.

Q. Then while you were walking on your crutches there from the bed to the bathroom, did you hurt either one hand or the other?

(Testimony of Frank Reiner.)

A. Yes.

Q. And will you tell us when that was and how that happened?

A. That was on the 12th of February.

Q. And what happened?

A. There is linoleum in our hall, and as I was using these old crutches, I slipped, and as I slipped that throwed in an awful lot of weight from one of the crutches into the palm of my hand and ruptured it, which caused something like a tumor in there, and it got as big as my thumb and it stayed there and it never did go away.

Q. Well then, after the 12th, then, what was done?

A. On the 17th.

Q. That would be February 17th of '55?

A. February the 17th, I was taken in a taxi to Dr. Carlson's office.

Q. And at whose request?

A. Dr. Mundal's.

Q. Then when you were taken to Dr. Carlson's office, what did Dr. Carlson do for you?

A. He X-rayed my leg and back.

Q. Then after you were taken up there, did you return home? [31]

A. Yes.

Q. And then what was done following that?

A. Well, still putting on hot packs and hot towels and everything still the same.

Q. Well now, during the month of February, then, you went to Dr. Carlson's office for X-rays,

(Testimony of Frank Reiner.)

and Dr. Mundal came out to the house; is that correct? A. Yes.

Q. During all that time, were you suffering pain in the parts where you were injured?

A. Yes.

Q. Now, what about—then, in March, what happened during that month?

A. Well, in February there was still——

Q. Well, February, yes. You have nothing more to add?

A. I got worse on the 21st.

Q. Yes?

A. And we called Dr. Mundal, and he came out to the house, and they had to take me with the ambulance to the hospital, Good Samaritan Hospital.

Q. Then how long were you in the hospital on that occasion? A. Four days.

Q. And then while you were there, what was done for you at that time?

A. Well, they just gave me shots and different things while [32] I was at the hospital there.

Q. Well then, after four days being there, you returned to your home, didn't you?

A. Yes.

Q. Then what else was done after that?

A. About the 12th, Dr. Mundal, he told me——

Q. Now, wait a minute, the 12th, is that——

A. Of March.

Q. Yes.

A. I was sent to the Medical-Dental Building for some more X-rays of my back and leg.

(Testimony of Frank Reiner.)

Q. Then who took those X-rays; do you know?
Mundal had you go to——

A. I don't know the name of it.

Q. Well then, what happened after those X-rays were taken?

A. About March the 31st, I had seen both the doctors.

Q. When you say "both," now, you mean——

A. Dr. Mundal and Dr. Carlson.

Q. Yes.

A. And they sent me to Good Samaritan Hospital.

Q. Well then, when you entered the Good Samaritan Hospital in March, that was March the 12th?
A. 31st.

Q. On the 31st, then how long were you in the Good Samaritan Hospital at that time? [33]

A. 14 days.

Q. And will you tell the jury—Court and jury just what treatment you received during these 14 days you were in the hospital at that time?

A. They had me—they put me in traction with weights on both feet for 14 days.

Q. Well now, you say "they put me in traction," you mean you were in bed?

A. Yes, I was in bed.

Q. And what apparatus did they have on you?

A. Weights.

Q. Whereabouts?
A. On both feet.

Q. And the weights?
A. Hanging down.

Q. Hanging down?
A. Yes.

(Testimony of Frank Reiner.)

Q. Were you able to move from side-to-side or did you have to remain in one position on your back?

A. I had to remain right on my back in the same position.

Q. And during all that time, did you continue to suffer pain on the parts of your body that were injured? A. Yes.

Q. While you were in the hospital at that time, were you given sedatives and drugs for the pain? [34]

A. Yes, in the evening or before time to go to sleep.

Q. How long were these weights on both of your legs then, during the entire time you were in the hospital or what?

A. Well, yes, except the last few days they took them off long enough in the morning so that I could go to the bathroom.

Q. And you were under the care of—still under the care of Dr. Mundal?

A. Dr. Mundal and Carlson.

Q. Then that takes us up to about the middle of April of '55. Then where did you go when you were released from the hospital by the doctor?

A. Went back home.

Q. And then what did you do at home?

A. Well, I went up to see Dr. Mundal about the 15th of April.

Q. Of April. A. (Witness nods head.)

Q. Yes.

(Testimony of Frank Reiner.)

A. And he sent me to the Oregon limb place there to have a brace for my back, get a brace for my back.

Q. Now, during the month of April, did you enter any other hospitals, that's of different—

A. No.

Q. Well, now then, the pain continued—did the pain continue in the various parts of your body that you were [35] injured in? A. Yes.

Q. Now then, around the first of June, did you try to go back to work, Mr. Reiner?

A. Yes, the 8th of June.

Q. Was that done at the request of the doctor or did you do that because you wanted to see if you could do it yourself?

A. It was at my request, my own.

Q. You wanted to work if you could?

A. That's right.

Q. And you went back then for how long a period?

A. I worked about—I worked two weeks and it was awfully tough going, rough.

Q. Did you work under difficulty?

A. Awfully difficult.

Q. And during that time were you suffering pain? A. Yes.

Q. Where? A. My leg and back.

Q. Now, when you would finish work at night, what would you do?

A. I'd go home and go to bed.

Q. Well then, after trying to work for this period of time that would bring us up to about

(Testimony of Frank Reiner.)

June, the middle part of [36] June, what then; what did you do after that?

A. I took off a couple of days. I thought I could maybe do better trying it again, and I tried it again and worked a few more days and it was getting worse, and——

Q. Well then, during that period there in June and July there, how long did you work? About how many days?

A. Oh, I imagine about 15 days, around that, something like that.

Q. Now, how many days have you worked since February 6, 1955, up to the present time, about?

A. 30 days, off and on.

Q. Well now, then the last time you tried to work was when?

A. About the middle of August, around in there.

Q. And what happened on that occasion, why did you discontinue?

A. Well, I just couldn't make it no more, it was getting worse.

Q. You not only tried it once, you tried it several times, to work? A. That's right.

Q. Now, during all this time, you say, and in August, when you finished work, what would you do, on Saturdays and Sundays?

A. Oh, I just didn't do nothing, just laid around in bed and took it easy.

Q. Now, during those months, will you tell us whether you [37] were continuing to suffer pain?

(Testimony of Frank Reiner.)

A. Yes.

Q. Where?

A. My knee and my leg and hip and back.

Q. Well then, what happened at that time, that would be on August 1st—around the 1st of September of 1955?

A. I went—August the 11th I went up to see Dr. Carlson and he took some more X-rays of my back and he said it didn't show no improvement.

Q. Well then, did you enter—were you requested to enter the hospital again?

A. Not right away, they put me on a diet first.

Q. And then when did you enter the hospital again? A. October the 2nd.

Q. That's of '55? A. Yes.

Q. Now, during all the month of October, did you continue to suffer pain in the parts you have told us about? A. Yes.

Q. Well then, when you entered the hospital in October, that was when in October; do you remember? A. The 2nd.

Q. What hospital did you enter?

A. Good Samaritan.

Q. How long were you in the hospital on this occasion? [38] A. 29 days.

Q. And what doctors took care of you during this period?

A. Dr. Carlson, Abele, and Dr. Mundal, too.

Q. Now, while you were in the hospital this time, what—did you undergo any operations?

(Testimony of Frank Reiner.)

A. I had a spinal fusion operation on my back.

Q. And when was that done?

A. October the 4th.

Q. And were you given a general anesthetic?

A. Yes.

Q. That was done on October 4th of '55?

A. October 4th.

Q. Now, while you were in the hospital, were you suffering pain? A. Yes.

Q. Where? A. My back, my leg.

Q. Now, then you were released from the hospital when? A. October the 29th.

Q. And what has been the situation, Mr. Reiner, from that time up to the present time in '57?

A. Well, I still have pain in my back, continuous pain in the back and down my left leg.

Q. Now, from the time of this accident up to the present time, have you ever been free from pain in the lower part [39] of your back?

A. No, I have not.

Q. Will you just describe the pain that you have, please, in the lower part of your back?

A. Well, it's from the—where the end of my back there—down into my left leg, the pain—it's kind of a burning sensation of pain in there all the time in there, day and night.

Q. Does the pain get worse at some times than at other times? A. Yes.

Q. And under what conditions does the pain get worse?

(Testimony of Frank Reiner.)

A. When I walk over rough places or go down the steps or stoop, bend, or twist around.

Q. Now, what about the situation as far as your right leg is—the right knee that was injured, how did that come out after the accident?

A. Well, I still have pain in there, too, especially when I go down the steps at times, or when I get up. If I am sitting down, I have quite a difficulty, and I have to go down sideways because it hurts in there all the time, in the knee, right in the knee.

Q. But that is only spasmodically that you have that; is that correct?

A. Yes. [40]

Q. At the time of this accident, what was your average monthly earnings?

A. A hundred—about a hundred and twenty-five—\$385 a month.

Q. And during '55 and October, was there a raise granted for the kind of work you were doing?

A. Yes.

Q. So that from October on, what would be your average monthly earnings?

A. \$427, I think it is, a month, about.

Q. Now, during the about 35 years that you worked for this railroad before the accident of February the 6th, 1955, had you ever in the 35 years you worked for this company ever had any accidents before?

A. Well, yes.

Q. And when was that; when and what kind of an accident was it; what part of your body was injured?

(Testimony of Frank Reiner.)

A. I had a broken toe, that is, I smashed my toe one time.

Q. And do you remember how long you were laid up with that? A. 27 days.

Q. And you recovered completely from that?

A. Yes.

Q. Now, prior to this accident of February 6, 1955, what was your general condition of health during all the years you worked for this company? [41]

A. I'd say pretty good, fair.

Q. Yes, and other than railroad accidents, were you ever in any other kind of accidents of any kind that you hurt any part of your body, that you can remember?

A. Yes, I—about 1952 I was buck hunting and I had twisted my leg, my knee, and had a—hurt my knee a little bit there in 1952.

Q. Then, at that same time, did you have any trouble with your back at that time?

A. I got—had a kind of a cold settled in my back, and had a little difficulty, lumbago or something.

Q. And you went to the doctor with your knee, did you? A. Yes.

Q. About how long would you say you were off work with your back and knee at that time?

A. About 30 to 40 days, something like that.

Q. And the doctor released you and you went back to work? A. Yes.

Q. And from that time up to the time you were

(Testimony of Frank Reiner.)

injured, had you had any difficulty whatsoever with your back or knee? A. No.

Q. I am just wondering, the railroads have periodical examinations of their men, don't they, by doctors? A. Yes.

Q. And do you recall now whether you had any examinations [42] made—between—after you were released by the company doctor in 1952 or not?

A. I don't recall, but I—it seems as though we did have an examination.

Q. Now, other than those accidents there, and have you had anything else of consequence outside of a cold or anything that took you away from work for any length of time that you can remember? A. No, not that I can recall.

Q. Now, before this accident, will you tell us whether you were able to sleep good at nights?

A. Yes, sir.

Q. And what has been the situation since the accident?

A. Not very good, I sleep very poorly.

Q. How long are you able to sleep at a time?

A. Two—three hours, sometimes not even that much.

Q. And then what happens?

A. I just wake up and lay there.

Q. Now, are you still taking home treatments for your back?

A. I take therapy treatments at the doctor's office.

Q. What doctor is that? A. Dr. Mundal.

(Testimony of Frank Reiner.)

Q. And how many therapy treatments have you had for your back since this accident, approximately? [43]

A. Up in and including January, '57, thirty-six. About thirty-six.

Mr. Rerat: That's all the direct examination at this time.

Cross-Examination

By Mr. Gearin:

Q. Mr. Reiner, you have retired at the present time, haven't you?

Mr. Rerat: That's objected to as incompetent and immaterial.

Mr. Gearin: You have retired on a company retirement——

Mr. Rerat: That's objected to as immaterial, incompetent, and irrelevant—just a minute, please, I have an objection——

Mr. Gearin: I will tie it up, your Honor.

Mr. Rerat: Your Honor, I would like to furnish.

The Court: Is it offered on the issue of damages?

Mr. Gearin: Well, it has to do with some other part about which I may impeach the witness, your Honor.

The Court: Well, if it's offered for impeachment purposes, that's all right, but not if it's offered on the issue of damages.

Mr. Gearin: I am not offering it on that issue of damages at all, your Honor.

(Testimony of Frank Reiner.)

The Court: Well, the jury will understand that whether a man is retired on a pension or not has nothing to do with whether or not he is entitled to recover in a suit such as [44] this. In any event, if you find that he is entitled to recover, this has nothing to do with the amount he is entitled to recover.

Mr. Gearin: I offer it for a limited purpose, your Honor.

Q. (By Mr. Gearin): Now, Mr. Reiner, I understand that you like to hunt, do you? You went hunting in 1952? A. Yes.

Q. All right. Now, since the time of your operation, have you been getting around just like you have been here the last—just today you have difficulty getting around? A. Yes.

Q. All right. Now, on the 3rd of March, or the 11th of March, 1956, did you apply to the Game Commission for a hunting and fishing license, and at that date received License Number 03342?

A. Yes.

Q. All right. And last year you won the employees' salmon fishing derby with a 31-pound salmon, did you not? A. Yes.

Q. And after the case, the other case that we had here last August 1st, when that was not tried, you took your house trailer and went to Lake County deer hunting, didn't you? A. My son.

Q. Yes, you went deer hunting, didn't you? [45]

A. My son.

The Court: The question is, did you?

The Witness: I went with my son, yes.

(Testimony of Frank Reiner.)

Q. (By Mr. Gearin): All right. You have a house trailer at your house? A. Yes.

Q. Do you take that out on little excursions, now and then? A. No, sir, not by myself.

Q. Now, were you hurt when you jumped or were you hurt at the time of the collision between the unit and the other drag of crew 28?

A. That I don't know, when I was hurt.

Q. Now, what doctors have your attorneys had you see for examination? A. Dr. Brown.

Q. Where is Dr. Brown? A. Seattle.

Q. Did you go to Seattle for the purpose of being examined by a doctor in that city?

A. Yes.

Q. And you have been to what other doctors here in Portland? A. Dr. Grossman.

Q. And who else, now? A. Cohen.

Q. Dr. Lawrence Cohen? [46] A. Yes.

Q. And Dr. Robert McMurray? A. Yes.

Q. Have any of those four doctors you have mentioned given you any treatment at all?

A. No.

Q. When were you examined by Dr. McMurray?

A. About three days ago.

Q. And was that for the purpose of testifying at the trial here?

A. Well, to show my condition, I guess.

Q. Now, at the time that Hostler-Helper Moore came into the back unit, Mr. Reiner, did he tell you that they were going back to the yard?

A. No.

(Testimony of Frank Reiner.)

Q. Now, will you agree with me that when railroad men refer to a car length, that they refer to a car which is approximately 50 feet long, or 49 feet?

A. No, sir.

Q. All right, the long cars are called greyhounds, aren't they, and they're 60 feet long?

A. No, I never heard that expression before.

Q. Do you have a recollection now of whether the train was moving or standing at the time you jumped?

A. It was—I was—our—the engine that I was—I [47] jumped from was moving.

Q. Now, as you approached the scene where the accident happened, Mr. Reiner, did you see the light at the switch stand showing red? A. No.

Q. Did you see the light at the switch stand showing green? A. No.

Q. Did you see the switch stand at all, before—
A. No.

Q. Were you looking? A. No.

Q. Now, when you went to see Dr. Carlson, you were referred to him by Dr. Mundal?

A. Yes, sir.

Q. And Dr. Carlson has his office in either the Medical Arts or Medical-Dental Building?

A. Medical Arts.

Q. And does he have an office over at the hospital department where Dr. Mundal is?

A. Not that I know of.

Q. Now, do you say you hurt your back, back in 1952 when you were duck hunting?

(Testimony of Frank Reiner.)

A. No, I didn't.

Q. All right. Have you ever hurt your back before? A. No. [48]

Q. Have you ever worn a back brace before?

A. Yes.

Q. And who prescribed the back brace for you?

A. Dr. Mundal.

Q. And did Dr. Carlson examine your back at that time?

A. I don't recall whether he did or not.

Q. Now Mr. Reiner, did you say that when you got into the cab after you lined the switch and when Mr. Moore, the hostler helper came out there, that it was raining pretty badly and you couldn't see through the windshield? A. Yes.

Q. All right. Now, those cabs are equipped with windshield wipers, one on each side, aren't they?

A. Yes.

Q. Did you turn either one of them on?

A. No.

Q. Did you take any look at all as you were backing up toward the place where the accident took place? A. No.

Q. Do you know where the emergency valve is on those trains? A. Yes.

Q. Did you use the emergency valve to stop?

A. No.

Q. Is there a buzzer to the hostler?

A. Yes. [49]

Q. Did you use the buzzer that night?

A. No.

(Testimony of Frank Reiner.)

Q. Had you used the buzzer on prior occasions?

A. Yes.

Q. Did you tell Mr. Moore to turn the headlight on dim?

A. No.

Q. Did you turn it on bright?

A. Me?

Q. Yes.

A. No.

Q. Were you familiar with the provisions of the Consolidated Code of Operating Rules and General Instructions?

A. Yes.

Q. And when was the last time you had been examined on those, prior to the time of this accident?

A. Just a very short time before.

Q. All right, sir, was the dome light on the cab of the Diesel on as you approached, went back toward the scene of the accident?

A. I can't remember as to whether it was or not.

Q. All right. Now, you were charged with responsibility for this accident——

Mr. Rerat: That's objected to as incompetent and immaterial.

The Court: Did you finish your question? [50]

Mr. Gearin: No, sir; I have not.

The Court: Finish your question.

Q. (By Mr. Gearin): Mr. Reiner, were you charged by the company with responsibility for this accident?

The Court: Objection?

Mr. Rerat: That's objected to, your Honor, as immaterial and irrelevant.

The Court: Sustained in that form. What do you mean, was he accused?

(Testimony of Frank Reiner.)

Mr. Rerat: I am going to object to that as incompetent and not proper impeachment, your Honor, it's incompetent and immaterial impeachment.

The Court: Are you reading to the witness?

Mr. Gearin: I am asking him, your Honor, if that was the conversation. The conversation was gone into, your Honor, on direct examination.

The Court: Overruled; you may answer.

Q. (By Mr. Gearin): Is it not true, that Mr. Moore said, "We might have to go back to the lake"?

A. Not in just them words.

Q. All right. Now, I will ask you if at the hearing to which we have referred on page 51, you were asked these [53] questions, and gave this answer: "Question: Did you have any conversation with Hostler-Helper Moore before the reverse movement was started? Answer: None other than when he came back Moore said, 'Get off the seat back, Frank,' I got away, right away got off and said, 'What is the matter now?' He said, 'We are going to try out something, and we might have to go to the lake,' and at that time I stood in the middle of the cab."

A. Yes.

Q. All right. And when you refer to the lake, you referred to Guilds Lake? A. Yes.

Q. That's where you had been?

A. Yes.

Q. That's where you started out? A. Yes.

Q. And, Mr. Reimer, would it be your duty as a

(Testimony of Frank Reiner.)

pilot herder to protect the rear end of that train?

A. That just depends on where the move was made or what was being done.

Q. Well, at this particular instance, after they stopped on their way in from the lake into the Union Station, when they stopped at that time, would it be your duty to protect the end in case they stopped?

A. No, I had my red lights on there and I had one block [54] system and I had my rear end protected.

Q. All right. Would you refer to page 57 of the transcript of the hearing, please? All right. The fourth question down, please? All right. Were you at that time and at that place asked this question: "Question: Would it be your duty, Mr. Reiner, as a herder to protect that end in case the hostler stopped for some unknown reason? Answer: Yes."

A. Yes, for oncoming trains, yes.

Q. Now, how long had you stopped there before you started the reverse movement?

A. Oh, I couldn't say for sure.

Q. Would you say four or five minutes?

A. Well, I don't recall just down to the minute, I don't recall.

Q. Would it refresh your memory if you referred to the transcript, and I refer to page 50, Mr. Reiner, the fourth question from the bottom?

A. I guess that's about——

Q. "Just four or five minutes, maybe a little less."

(Testimony of Frank Reiner.)

A. I wouldn't swear one way or the other.

Q. Would you say you were about somewhere—12 to 14 car lengths back from where you were stopped until the place where the accident occurred?

A. About 12. [55]

Q. Is it also your duty to protect the movement at crossings?

A. If we was to go through a cross-over, yes.

Q. Now, prior to the time that you had stopped, that's when you started to back up, had you seen the other train with which you ultimately collided?

A. Yes, it was setting on the eastward main line.

Q. Would that be what you call the outbound main line? A. Yes.

Q. All right, sir. Did Mr.—do you remember Mr. Phillips, Don Phillips? A. Yes.

Q. Where was he?

A. He was on the other crew, the other train that was on the other track.

Q. Now Mr. Reiner, do you recall that on February the 19th, three days after the accident, you gave a statement to Mr. Jepson of the terminal company at your home at 2305 Southeast Ellis Street?

A. Yes.

Q. Was that typed out for you, that statement, do you recall? A. Yes, I believe it was.

Q. All right. And was someone else there with Mr. Ellis, I mean with Mr. Jepson? [56]

A. No.

Q. Wasn't Mr. Kanzler there?

(Testimony of Frank Reiner.)

A. Yes, but not when he—he was there afterwards.

Mr. Gearin: All right. And I was wondering if we might have this—this is an exhibit which has not been shown to counsel, your Honor, because it was for impeachment purposes.

The Court: Has it been marked?

The Clerk: No, sir.

The Court: It will be marked, what number would it be?

Mr. Gearin: It would be 26, your Honor.

The Court: 26 for identification.

(Whereupon Defendant's Exhibit Number 26 was marked for identification.)

Mr. Gearin: May it be handed now to the witness, your Honor?

The Court: It may.

Q. (By Mr. Gearin): Mr. Reiner, I am handing you Exhibit Number 26 and I ask you if that's the statement you gave to Mr. Jepson, and I will ask you further if your signature does not appear on each one of the four pages? A. Yes.

Q. And does not Mr. Kanzler's signature appear on each one of the four pages? [57] A. Yes.

Q. And he was the same man that represented you at the hearing on March the 4th?

A. Yes, sir.

Mr. Gearin: We offer Number 26 in evidence, your Honor. I don't think counsel has seen it, however.

(Testimony of Frank Reiner.)

The Court: Do you wish to read it during the afternoon recess?

Mr. Rerat: Yes, your Honor.

The Court: We will take the afternoon recess at this time.

Ladies and Gentlemen, you are excused for five minutes, subject to the usual admonitions. It is stipulated, gentlemen, that the jury may retire from the courtroom?

Mr. Gearin: Yes, sir.

The Court: Will you answer my question to the stipulation so the record will show?

Mr. Rerat: Yes, your Honor.

The Court: Is it stipulated that the jury may retire?

Mr. Rerat: Yes.

(Whereupon, the jury was excused for a recess and the following proceedings were had:)

The Court: Now, have you gentlemen agreed upon what does the record show the age of this plaintiff; have you [58] agreed upon what the life expectancy is going to be on the mortality table?

Mr. Rerat: 59, your Honor——

Mr. Gearin: I have forgotten.

Mr. Rerat: ——at this time.

The Court: He is 59?

Mr. Rerat: 57 at the time of the accident.

Mr. Gearin: Right, that's correct.

The Court: 57.

Mr. Gearin: And your Honor, I would be willing to enter into this stipulation if it's all right with

(Testimony of Frank Reiner.)

counsel, that insofar as any exhibits that may be introduced, written exhibits, that it may be read at any time by any counsel rather than reading it at the time it was introduced. Is that all right?

Mr. Rerat: That's satisfactory.

The Court: You haven't checked the mortality table?

Mr. Rerat: I have checked it, your Honor, it's 14 years, point 74. That's the American experience table, mortality table, that's the lowest, so I don't suppose that there is any objection.

Mr. Gearin: No, sir.

The Court: That is for age 57?

Mr. Rerat: Age 59, your Honor.

The Court: 59. 14 years—— [59]

Mr. Rerat: 14 years, point 74.

The Court: Very well, recess for five minutes.

(A short recess.)

The Court: Is it stipulated, gentlemen, the jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes.

The Court: You may proceed.

Cross-Examination
(Continued)

By Mr. Gearin:

Q. Mr. Reinier, when Hostler-Helper Moore came back to the cab, there was some conversation with him, wasn't there?

A. Just one thing what he said there was, "Get off the seat box."

(Testimony of Frank Reiner.)

Q. And then he pressed the buzzer three times?

A. Yes.

Q. And three times means to back up?

A. Yes.

Q. And what means to stop? A. One.

Q. Then after he pressed it three times is when the backup movement began? A. Yes.

Q. Did you say anything to him after he pressed the button three times? [60]

A. I either said or tried to say, "Hold her," but it was only a matter of seconds before we hit.

Q. Now, after the accident, it was your leg that hurt you, was it not?

A. My leg and back and knee and all hurt.

Q. Didn't your leg—wasn't that hurting you the most that night?

A. Yes, the leg was the worse.

Q. And that's what they X-rayed at the hospital that night? A. That's what that guy X-rayed.

Q. And then a little later on your back started hurting?

A. The pain was so severe in my leg that it was hurting me all over. But it was so severe that you really couldn't tell. I was sore all over.

Q. Well, the next day you experienced pain in your leg and hip and that, you say, was bad?

A. My leg, back, and hip.

Q. All right. Did your back hurt you right away?

A. Yes.

Q. All right. Now, I wonder if the Clerk would

(Testimony of Frank Reiner.)

hand to the witness Exhibit Number 27 which is the plaintiff's adverse-party deposition?

The Court: Has that been opened, Mr. Clerk; is it opened?

The Clerk: Yes, sir. [61]

The Court: The Clerk says this is the deposition taken in connection with some other case.

Mr. Gearin: Yes, your Honor, it's in connection with the cause number 8538 in this court between the same parties.

Mr. Rerat: Well, excuse me, this same case?

Mr. Gearin: Well, yes, just—it involves the same issues.

The Court: Very well, place it in the hands of the witness.

(Document handed to witness.)

Q. (By Mr. Gearin): Will you look at the first question and answer on page 27, please? Do you have that in mind, Mr. Reiner? A. Yes, I have.

Q. And this was a deposition taken May 22nd, last year, at Mr. Lezak's office, and Mr. Larkin of my office was there with Mr. Johnson and Mr. Lezak, your attorney; do you recall the occasion?

A. Yes.

Q. Did you at that time recall being asked this question and giving this answer: "Question: Well, later, did any other part of you hurt? Answer: Oh, yes, my back started hurting. Question: When? Answer: Oh, as time progressed this got better, but

(Testimony of Frank Reiner.)

it was quite a little while until I got this other—got any relief.” Did you so testify? [62]

A. Yes.

Q. All right. And isn't it true that the doctor came out to see you the day after the accident?

A. No.

Q. All right. Will you refer to the second question down from the one to which I just directed your attention? A. The second?

Q. And at that time?

A. Which—where is this?

Q. On page 27. A. Second question?

Q. And you referred then to some notes you had in your possession?

A. Yes. What is the question?

Q. Well, do you remember at that time your deposition was taken you referred to some notes you had about dates and times?

A. Well, I don't recall.

Q. Have you kept a diary of the dates you went to the hospital and saw the doctor?

A. Yes, pretty much.

Mr. Gearin: That's all. I have no further questions.

(Testimony of Frank Reiner.)

Redirect Examination

By Mr. Rerat:

Q. Were you asked this question, Mr. Reiner, in continuing, [63] counsel read part of this in regard to questions about your injuries, and were you asked this question and did you give this answer: "Question: Well, could you tell me first how long after the accident it was that you noticed any back pain? Answer: Well, it was all the time, I had something all over as far as—I was sore all over, all the time from the time of the accident my hip, my back and everything, but that was where it hurt me the worst, was my knee and my leg and my hip and the lower part of my back and my hip." Were you asked that question by an attorney from his office and did you give that answer? A. Yes.

Q. Yes. Now, your Honor, Exhibit 26 was marked and was that offered in evidence or not?

Mr. Gearin: I offered it.

Mr. Rerat: Well, I——

The Court: It was offered before the recess. I have heard nothing about it. We took a recess to give you an opportunity to read it.

Mr. Rerat: Yes, your Honor, and I hadn't considered anything about it when the recess was over, but I have no objection, your Honor.

The Court: Very well.

Mr. Rerat: As far as this exhibit is concerned.

The Court: Now, will you please address your remarks [64] to me? You have no objection?

DONALD E. PHILLIPS

called in behalf of the plaintiff and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name, please?

A. Donald E. Phillips.

Q. Where do you live, Mr. Phillips?

A. 3100 Southeast 144th.

Q. By whom are you employed?

A. Northen Pacific Terminal Company.

Q. How long have you been employed by this railroad company? A. Seven years.

Q. In what capacity? A. Switchman.

Q. Were you working as a railroad switchman on December—or, on the 6th day of February, 1955?

A. Yes, sir.

Q. What time did you go to work on that particular day?

A. It was either 3:00 o'clock or 4:00 o'clock, I am not sure.

Q. Well 3:00—4:00 o'clock, and you would be through at about 11:00 or 11:30 that night?

A. Yes, sir.

Q. Now, about 9:00 o'clock that evening, did you have— [67] were you with a crew that had some cars on the eastbound main line track that was involved later in an accident? A. Yes, sir.

Q. What kind of an engine did you have on that cut of cars that night?

(Testimony of Donald E. Phillips.)

A. Diesel switch engine.

Q. And how many cars did you have attached to the Diesel if you remember?

A. I am not sure, but it was around 30 cars.

Q. Now, was that—was the Diesel and the cars on the east line or on the eastbound main track?

A. Yes, sir.

Q. Now, do you recall that while your—while your cut of cars was standing on that track, do you recall that two engines came up from the north traveling south toward the terminal on the westbound main track?

A. Yes, sir.

Q. Where were you when you first saw them?

A. I was in the Diesel engine.

Q. And do you remember about where the Diesel engine was when you first saw them?

A. The S. P. Diesel?

Q. Yes.

A. Oh, they were approximately at 21st Street.

Q. That would be south of the—or rather, north of the [68] portion shown on Plaintiff's Exhibit 1, which is the exhibit there?

A. Yes, sir.

Q. Well now, your cut of cars would have to remain on the eastbound main track then until the two engines had cleared that crossover that extended from the eastbound main line to the westbound main line?

A. That's right.

Q. As shown in Plaintiff's Exhibit 1?

A. That's right.

Mr. Rerat: Your Honor, we have Dr. McMurray

(Testimony of Donald E. Phillips.)

in court, and I wonder if we could withdraw this witness and place Dr. McMurray on the stand?

Mr. Gearin: That's satisfactory, your Honor.

The Court: You may.

Mr. Rerat: All right, thank you.

(Whereupon, Donald E. Phillips was temporarily excused.) [69]

(Donald E. Phillips resumed the stand on direct examination by Mr. Rerat and was examined and testified further, as follows:)

Mr. Rerat: Let's see, could you tell me about where were were, Mr. Reporter? I don't know.

The Court: Suppose the witness tells you what you were talking about before Mr. Phillips was interrupted.

The Witness: It seem as though he asked me how many cars we had a hold of.

Q. (By Mr. Rerat): Then, how many cars did you have a hold of?

A. I think it was around 30.

Q. About 30. Now, from the eastbound main line track you were going to take what course?

A. Well, we were crossing over to the westbound main-line track.

Q. Now, could you step down to Plaintiff's Exhibit 1, which is an aerial view of the place where the accident happened and show us the course that your engine and cars were going to take or did take from the eastbound main line to the westbound main line?

(Testimony of Donald E. Phillips.)

Now, before you do that, Mr. Phillips, do you understand that exhibit? That is, I mean, the directions and what is shown on there?

A. It is quite confusing. [70]

Q. Well, it's been testified to that the north, or the upper part of the picture is north, the lower part is south.

A. Oh, I see. We were standing right here (indicating).

Q. And what would the course of your movement be then?

A. Right through here (indicating) along this way (indicating).

Q. Yes. Now, the engine, I believe, that you said was on the front end or on the north end?

A. Right here (indicating) yes, our engine.

Q. Your engine? A. Yes.

Q. Then the other cars would be immediately in back of it? A. Yes.

Q. And you said about 35 cars; is that correct?

A. That's right.

Q. Now, what is the average length of a boxcar?

A. Forty feet.

Q. In order for you—or, for the movement of the cut of cars that your engine had a hold of to proceed from the eastbound main track to the westbound main track, would it be necessary for any switches to be made?

A. Oh yes, this one here (indicating) would have to be lined. [71]

Q. And which other one?

(Testimony of Donald E. Phillips.)

A. And this one right here (indicating).

Q. Now, when the switch, the last one you indicated, you pointed to on Plaintiff's Exhibit 1, when that would be lined for the movement from the eastbound to the westbound track, looking at that switch light from the south, that would be what color? A. Red.

Q. And what would that mean?

A. That would indicate that this was lined for the crossover.

Q. And with a red switch, should there be any movement against—on a track where the switch is lined red? A. No.

Q. Now, when your train, or when your cut of cars proceeded across to the westbound main-line track, before all of your 35 cars cleared, was there a collision or an impact? A. Yes.

Q. And where were you when this impact took place? A. I was in the engine.

Q. That is the engine—will you show us approximately about where?

A. Approximately right there (indicating).

Q. That would be south of where the X mark is on Plaintiff's Exhibit 1 on the main-line track; is that right? [72] A. Yes, sir.

Q. Now, when the impact took place, what happened to you?

A. Well, I was hit in the back—

Mr. Gearin: Just a moment, that's entirely immaterial as to the injury, if any, sustained by Mr. Phillips on a different train.

(Testimony of Donald E. Phillips.)

Mr. Rerat: Well, your Honor, I am not going into the injuries. I just—were you injured, actually, answer yes or no?

The Witness: Yes.

The Court: Proceed.

Q. (By Mr. Rerat): Then with the movement stopped, that is, after the impact the movement stopped, what did you do?

A. Well, after a couple of minutes, I got up and went and walked up to 17th Street, which isn't pictured. It would be here (indicating) and called the yardmaster and had them to send an ambulance down to pick up Mr. Reiner.

Q. Now, before that time, had you seen Mr. Frank Reiner?

A. Yes, as I came out of the engine he was right in the ditch right there (indicating).

Q. And will you just describe Mr. Reiner as you saw him on that particular night?

A. Well, he acted as though he was in pain and I was excited, he may have had broken bones, so I was the only one available to leave and call the yardmaster to order an [73] ambulance.

Q. And did you talk to him?

A. Not at that time, no. After I come back from the telephone I did.

Q. Would you give the conversation? I mean, what was said by either one of you, will you just tell how he talked?

A. Well, he didn't talk normal.

Q. Then when you got out of the engine and you

(Testimony of Donald E. Phillips.)

walked back, did you see where the impact had taken place? A. Yes.

Q. And how far behind your engine did this impact take place; where was the point of collision, about?

A. It was either the fifth and sixth cars, or the sixth and seventh cars. I am not positive about it.

Q. And then there was, at the time of the impact then, approximately how much of your train or how much of the cut of cars that your engine had a hold of was on the westbound main track?

A. Our engine, one car and a half.

Q. I see. And during all that time—strike that. I don't know whether I have asked you or not about it; when we speak of switches and switch stands, could you tell us about how high they are?

A. Six feet high.

Q. And will you tell us whether or not at night they are [74] lit, there is a light?

A. They are supposed to be.

Q. Yes. And you have what kind of lights?

A. Kerosene.

Q. I mean, what color? A. Red and green.

Q. And do you know whether or not that light was red as your—as the movement of the cut of cars that you were a member of proceeded across from the eastbound to the westbound and onto the westbound track? A. It was.

Q. It was red? A. Yes.

Q. I don't believe you told us what kind of a

(Testimony of Donald E. Phillips.)

night it was, what have you to say; do you remember?

A. Well, it was drizzly wet.

Q. All right. You may be seated. That's all of the direct examination, your Honor.

Cross-Examination

By Mr. Gearin:

Q. Mr. Phillips, that night, even though it was drizzly, you had no difficulty in distinguishing and being able to observe the lights on the switch stands, did you?

A. I walked up, right up to it.

Q. Well, you could see it though? [75]

A. Oh, yes.

Q. Now, your instructions before you crossed were to wait for the S. P. Diesel to go by, before you started out? A. Yes.

Q. All right. Mr. Reiner did not go away in an ambulance, did he? A. No.

Mr. Gearin: I have no further questions, thank you.

Redirect Examination

By Mr. Rerat:

Q. And did you notice what happened after you got back down, who took him away, or anything?

A. No.

Mr. Rerat: That's all.

The Court: You may step down. We will take the recess at this time until tomorrow morning at 9:30.

(Witness excused.)

(Whereupon, an adjournment was taken until 9:30 a.m. of the following day.) [76]

Tuesday, January 22, 1957, 9:30 A.M.

The Court: In the case on trial, Gentlemen, is it stipulated the Jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: You may proceed.

Mr. Rerat: Your Honor, I was wondering whether yesterday I had introduced in evidence the American Table of Mortality. It has to do with life expectancy.

The Court: You indicated at the close of the session that you expected to ask the Court to take judicial notice of the table, and I believe you said you had looked it up.

Mr. Rerat: Yes, your Honor, and the life expectancy of an individual 59 years of age is 14.74 years.

Mr. Gearin: I have no question about that, your Honor.

The Court: Very well, since you both agree the Court will take judicial notice of that fact.

Mr. Rerat: Your Honor, may we recall Mr. Phillips, please?

The Court: You may.

DONALD E. PHILLIPS

recalled by plaintiff, having been previously sworn, was examined and testified as follows: [77]

Direct Examination

By Mr. Rerat:

Q. Mr. Phillips, I overlooked asking you a couple questions when you were on the stand yesterday afternoon. When your engine and cars moved from the eastbound main-line track to the westbound over the crossover track, from that time it started moving up until the time of the collision what was the approximate speed of the movement of your cut of cars?

A. About two miles an hour, approximately. It couldn't have been over that.

Mr. Phillips, during the time that you have worked for this railway company have you also done the work of a pilot-herder switchman?

A. Yes, sir.

Q. So are you familiar with the duties of that kind of work for this company, this railroad company?

A. Yes.

Q. Mr. Phillips, will you tell us generally, will you tell us what are the duties of a pilot-herder switchman?

A. Well, he is required to couple on and uncouple engines from passenger trains and protect the high shed and cut it when necessary and couple it up when necessary.

Q. Had you finished?

(Testimony of Donald E. Phillips.)

A. I believe that covers everything. [78]

Q. Does the pilot-herder switchman have anything to do with the operation of the engine?

A. None whatsoever.

Q. Does the pilot-herder have anything to do with the operation of the lights in the front or where you have a double unit back-to-back with the operation of the light in front of the engine, putting it on dim or bright?

A. No, sir.

Q. Does he have anything to do with the operation of a windshield wiper in front?

A. No, sir.

Q. Is he able to give instructions—withdraw that—is the fireman under the pilot-herder switchman?

A. No, sir.

Q. Where you have a movement of a unit, a double unit, the units being back-to-back on the main-line track, does the pilot-herder have anything to do with keeping a lookout as far as the track is concerned for any obstacles on the track?

A. No, sir.

Q. Where the movement is made with a double unit back-to-back on the main-line track and the movement stops unbeknown to the pilot-herder and the movement is made in the reverse direction, if the pilot-herder is in the cab of the engine does he have any responsibility, or does he have any duties as far as looking down that track for any obstacles on the track? Do you [79] understand my question?

A. I understand the question, but I don't know just how I want to answer it.

(Testimony of Donald E. Phillips.)

Q. Well, you answer it the way it is right, the correct way.

A. While working for the Terminal Company, no.

Q. Showing you Plaintiff's Exhibit 11 which has been marked, and it has been stipulated, your Honor, that that is an order that was issued by the company under the signature of Mr. Jones (the General Manager, and we offer Plaintiff's Exhibit 11 in evidence.

Mr. Gearin: We have no objection to the identity, your Honor. What that document purports to be is part of a union agreement with respect to part of the duties of a pilot or a pilot-herder.

The Court: What is the identification number of it?

Mr. Rerat: Eleven, your Honor.

The Bailiff: No, it is Exhibit 13.

Mr. Rerat: I am sorry. I thought it was eleven.

The Court: It is stipulated to be an excerpt, I take it from the union contract?

Mr. Rerat: Yes, your Honor.

The Court: Received in evidence.

(Thereupon, the document previously marked Plaintiff's Exhibit 13 for identification, part of union agreement, was received in [80] evidence.

Mr. Rerat: It designates the duties of a pilot-herder.

Mr. Gearin: We object to that, your Honor. It speaks for itself.

Mr. Rerat: Well, yes.

(Testimony of Donald E. Phillips.)

Mr. Gearin: It is not what Counsel says.

Mr. Rerat: Well, it is what I said. It says so.

The Court: The document speaks for itself. You will have plenty of time to argue when the case goes to the jury. Exhibit 13 for identification is received. It is stipulated to be an excerpt from the union contract. What it covers, I suppose the language speaks for itself. You may show it to the witness.

Q. (By Mr. Rerat: Now, Mr. Phillips, did you receive a copy of Exhibit 13?

The Witness: Yes, sir.

Q. What is Exhibit 13?

A. Shall I read it?

Q. Yes, read it.

A. (Reading): "It is the Company's position that a Pilot's duties also properly include the following:

"1. The coupling and/or the uncoupling of cars on passenger trains at the crossings in depot passenger train yard.

"2. The coupling and/or uncoupling of road engines of passenger trains in the depot passenger yard. [81]

"It is also the Company's position that giving the necessary signals for passenger trains to proceed when they are to leave the depot passenger yard when loading of passengers, mail, express, etc., has been completed and likewise governing the movement of passenger trains within the depot yard tracks to discharge the aforementioned traffic and

(Testimony of Donald E. Phillips.)

to pull over passenger, foot, or truck crossings is Stationmaster's work."

Mr. Rerat: I think that is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Phillips, you did not have a passenger train, did you, at the time of this accident?

A. No.

Q. A passenger train was not involved in the movement of the two diesel units? A. No.

Q. Will you agree with me that a pilot-herder gets more money than a herder?

A. I don't know.

Q. Are you familiar with the provisions of Rule 106 of the Consolidated Code of Operating Rules, Mr. Phillips?

A. I probably am but not under that name.

Q. Are you familiar with the provisions of Rule 108 of the same set of rules?

A. I have read it.

Q. Thank you. I have no further questions.

The Court: You may step down.

(Witness excused.) [82]

JOHN F. LEAP

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. John Franklin Leap.

Q. Where do you live, Mr. Leap?

A. 6015 Northeast 28th Avenue.

Q. How long have you lived in Portland, Oregon? A. Twenty-one years.

Q. Are you a married man? A. Yes, sir.

Q. By whom are you employed?

A. Northern Pacific Terminal Company.

Q. How long have you been employed by that railroad company?

A. Nineteen years and eleven months.

Q. You are still working for that company?

A. Yes, sir.

Q. During the time that you have worked for this railroad company have you worked as a switchman and as a pilot-herder switchman?

A. Yes, sir.

Q. Will you tell us what are the qualifications of a pilot-herder? [83]

A. He shall be a qualified engine fireman to assume the duties of a pilot-herder.

Q. In other words, a fireman is qualified as a pilot-herder; is that correct? A. Yes, sir.

Q. With this company. Now during the years

(Testimony of John F. Leap.)

that you have worked for this company have you had occasion to work as a pilot-herder switchman?

A. Yes, sir.

Q. About how much of the time have you worked as such? A. About six months, I would say.

Q. When working as a pilot-herder, have you had occasions to take double units diesels from the Northern Pacific Terminal to the Guilds Lake Yards? A. Yes, sir.

Q. Are you familiar with the duties of a pilot-herder? A. Yes, sir.

Q. Mr. Leap, will you tell us in a general way what are the duties of a pilot-herder?

A. He has to uncouple the cars, the passenger train cars, at the height shed and couple them if necessary, to uncouple the road engines from the trains and to couple them to the trains.

Q. Does the pilot-herder travel with the engine from the Terminal station to the Guilds Lake [84] Yards? A. In some cases.

Q. In some cases?

A. Sometimes; yes, sir.

Q. Does the pilot-herder have anything whatsoever to do with the operation of the engine?

A. None whatsoever.

Q. Does he have anything to do with the putting on of a headlight, either dim or bright?

A. No, sir.

Q. Or does he have anything to do with the operation of a windshield wiper on the engine, or does he have anything to do with the working of

(Testimony of John F. Leap.)

any of the other valves such as an emergency brake or anything else connected with the engine?

A. No, sir.

Q. When an engine is operated, in the front cab there is a fireman and an engineer?

A. Yes, sir.

Q. When that engine is being operated in, well, first take the forward movement on a main-line track. Does the pilot-herder have anything to do with keeping a lookout on that track for obstructions on the track?

A. No, we are alert at all times, but that is not our duties to see that there is—that is the engineer and the fireman's duties.

Q. Does the pilot-herder have any duty of opening the cab, [85] the windows in a cab, so that the fireman or the engineer can have a better, get better vision of what is in front or in back of the engine?

A. No, sir.

Q. When a movement is being made on the main-line track and with a double unit and the unit stops and there is a reversed movement made on the main-line track, does the pilot-herder have anything to do as far as keeping a lookout for obstructions on the track?

A. To the rear or to the front?

Q. Yes, if the movement is being that way?

A. No.

Q. He does not. Does he have anything to do with any of the mechanism as far as the locomotive engine is concerned?

A. No, sir.

Mr. Rerat: That is all.

(Testimony of John F. Leap.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Leap, you say that the pilot-herder is all the same as a qualified engine-fireman?

A. Yes, sir.

Q. His rate of pay then, of course, is higher than that of an ordinary herder?

A. Would you define a herder for me, sir? I mean a pilot-switchman herder I understand is the same qualifications. [86]

Q. What is a pilot-herder?

A. You are asking me what the pilot-herder or is it just anyone a herder?

Q. So that we can define our terms, what is a pilot-herder?

A. A pilot-herder is a classification of a workman for, in this case, the Terminal Company, that pilots or herds the engines.

Q. You say a pilot-herder pilots the engines. Is that different than a pilot-herder switchman?

A. Might I ask you, are we getting these terms, I mean aren't you putting in different terms all the time there?

Q. The point is did you refer to the term of pilot-herder switchman in your direct examination in answering questions by Mr. Rerat?

A. Yes.

Q. All right, will you define that term for us?

A. You mean what is meant by it?

(Testimony of John F. Leap.)

Q. Yes, what did you mean by it?

A. A pilot-herder switchman is a man that couples the passenger engines and uncouples them. He couples the engines on to the passenger trains and uncouples them.

Q. What do you mean by a pilot-herder, the same thing or something different?

A. It would be the same thing.

Q. He is the one that pilots the engine? [87]

A. Yes, sir.

The Court: In other words, when you speak of a pilot-herder you speak of a pilot-herder switchman. You are talking about the same thing; is that it?

The Witness: Yes, sir.

Q. (By Mr. Gearin): Is it the duty of one who pilots an engine to keep a lookout for anything that might happen?

A. I have already stated that we are supposed to be alert?

Q. Is it the duty of a pilot to take a safe course?

A. Always.

Q. That is Rule 108, isn't it? All right, sir, is it the duty of the pilot-herder to protect the crossings?

A. Public crossings, public grade crossings or foot crossings at the depot that——

Q. Let's say crossings other than foot crossings at the depot.

A. There is a high shed crossing that we will look out for.

(Testimony of John F. Leap.)

Q. Is it your duty to protect the rear end?

A. No.

Q. Are you familiar with the provisions of Rule 106? A. Yes.

Mr. Gearin: I wonder if we could have the clerk or bailiff hand to the witness Defendant's Exhibit No. 21.

(Document presented to the witness.)

The Court: Is that in evidence yet, counsel? [88]

Mr. Gearin: No, sir. We will offer it in evidence, your Honor.

The Court: Is it stipulated to be genuine?

Mr. Rerat: Yes, your Honor, it is. No objection.

The Court: A copy of the rules?

Mr. Gearin: Yes, sir.

The Court: Exhibit 21 is received in evidence. Received.

(Thereupon, the document, copy of rules above referred to, previously marked Defendant's Exhibit 21 for Identification, was received in evidence.)

Q. (By Mr. Gearin): Will you read Rule 106?

The Court: To himself or out loud?

Mr. Gearin: Out loud, please.

The Witness: "The conductor and the engineer and pilot, when there is one, are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules must take every precaution for protection."

(Testimony of John F. Leap.)

Mr. Gearin: Thank you, sir. I have no further questions.

Redirect Examination

By Mr. Rerat:

Q. Just one question. If you have just two engines, is that a train, considered a train where you just have two engines [89] running a unit together?

A. Might read the definition of a train?

Q. Yes, if it is there.

A. First I will read a definition of an engine. "An engine is a unit propelled by any form of energy for use in train or yard service." "A train is an engine or more than one engine coupled with or without cars displaying markers."

Mr. Rerat: Thank you. I have no further questions.

The Court: Would you read that again? I don't think I understood it. You say with or without cars?

The Witness: Yes, sir—the train, sir?

The Court: Yes.

The Witness: A train is an engine or more than one engine coupled with or without cars displaying markers.

The Court: Two engines coupled together displaying markers would be a train?

The Witness: Displaying markers would be a train.

The Court: What are markers?

The Witness: That's flags or lights, you see, on

the front of the train indicating, or, they are white or green.

The Court: Anything further, gentlemen?

Mr. Gearin: No, sir.

The Court: You may step down.

(Witness excused.) [90]

WILLIAM ROBERT McMURRAY

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. William Robert McMurray.

Q. What is your profession?

A. I am a physician and surgeon.

Q. What school are you a graduate of?

A. University of Oregon Medical School.

Q. What year? A. 1943.

Q. And you are duly licensed to practice medicine in the State of Oregon? A. Yes, I am.

Q. Where are your offices located, doctor?

A. 919 Southwest Taylor Street.

Q. Since your graduation from medical school up to the present time, will you tell us just what your learning and experience has been in your profession?

A. Well, after graduation from medical school, I interned at Brooklyn, New York, at the Long

(Testimony of William Robert McMurray.)
Island College Hospital [1*] for a nine-month period, then I was in the military service as a naval doctor for two years, then I returned from the service and I spent eighteen months as a general resident and in general surgery in Providence Hospital here in Portland. I then spent a year in the University of Oregon Medical School, again as a resident in general surgery. After that I went to the University of Iowa from 1949 through 1952 where I took further training in orthopedic surgery and I have practiced six months in Yakima, Washington, prior to returning to Portland, Oregon, where I have been since then.

Q. Now, doctor, you have stated that you specialized in orthopedic surgery. Will you tell us what is meant by orthopedic surgery?

A. It is the specialty of dealing primarily with afflictions of bones and joints.

Q. Doctor, are you on the staff of any hospitals in Portland, Oregon, here?

A. Yes, I am on the staff of St. Vincent's Hospital and the staff of Providence Hospital in Portland.

Q. And are you connected with the University here in any capacity?

A. Yes, I am. I am the clinical instructor at the University of Oregon Medical School in Orthopedic Surgery.

Q. How long, doctor, have you taught orthopedic surgery at the University? [2]

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Testimony of William Robert McMurray.)

A. Approximately three years.

Q. And are you a member of the various medical societies, doctor, if so, will you name them?

A. Well, I am a member of the Multnomah County Medical Society; the Oregon State Medical Society; the Western Orthopedic Society and the American Medical Association.

Q. Now, doctor, at the request of Mr. Lezak, Bailey, Lezak and—or Bailey & Lezak firm, did you make an examination of the plaintiff in this case, Mr. Frank Reiner? A. Yes, I did.

Q. Now, was that made for the purpose of determining what injuries he was suffering from so that if necessary you could come into court and explain to the court what injuries Mr. Reiner was suffering from at this time and what the future holds for him?

Mr. Gearin: I object to the form of the question.
The Court: Sustained.

Q. (By Mr. Rerat): Well, when was this examination made?

A. January 15th of this year.

Q. Now, doctor, will you tell us just what the extent was of your physical examination of him was; just what your observations were; just what tests were, if any, were made by you and just what the results were of those tests and what your conclusions were as to what injuries, if any, [3] you found him suffering from after your examination?

A. Physical examination? *

(Testimony of William Robert McMurray.)

Q. Yes.

A. Physical examination. All right. The patient was ambulant without difficulty. He walks well on his toes and on his heels. He gets in and out of a chair jerkily and complains of pain in his low back. As regard to his back, there is a spinal fusion scar between L-4 and the sacrum, and a scar over the posterior left ilium. That's over the left hip. In the back at the donor site, the donor site is where the bone is taken for the original fusion. The scar is well healed. There is no drainage. There is some tenderness of the superior portion of the scar over the spinous process of L-3, the third lumbar vertebra. On forward bending, forward flexion, he gets his fingertips to within 8 inches of the ground. Backward bending is absent beyond neutral. Bending to the right and bending to the left are limited approximately 10 to 20 degrees and there is no gross motion in the fused area. There is no spasm in the lumbar musculature, that's the muscles, either in the prone or the standing position. There is some scoliosis, that is bending of the spine, of the lumbar spine to the right with some rotation of the spine. With the patient in the prone position, the instability test at the lumbosacral fusion site is positive. I will have to explain that. With [4] the patient lying face down, pressure on this man's back at the site of the fusion when he is in a relaxed position produced pain. But with the patient laying with his head hanging over the edge of the bed,

(Testimony of William Robert McMurray.)

then the pain was less on pressing down. That's the positive instability test.

Lower extremities, leg lengths, are equal. The thighs measure 19 inches in circumference around the leg at a point 4 inches above the kneecap. 5 inches below the kneecap, the right calf measures 15 and 5/8ths inches and the left measured 15 and 1/4th inches. The left is 3/8th of an inch smaller around at the calf.

Q. Doctor, may I just interrupt you just a minute there. Did that have any significance, the difference between the two calves?

A. It could have some significance.

Q. What is the significance?

Mr. Gearin: Well, we object to the form of the question, your Honor, on the ground that it's not what could be, it's what is the difficulty.

Mr. Rerat. What is the significance as far as the doctor is concerned?

Mr. Gearin: We object, your Honor, the witness has already answered it. He said it could only have some significance. If it has, the doctor may so testify.

Q. (By Mr. Rerat): I will withdraw the question for the [5] time being, doctor. Will you just go on?

A. Straight leg raising test, that is with the patient lying on his back with his legs straight out is 50 degrees from the horizontal bilaterally with pain at the fusion site in his back. The second sign was negative. Now, the second sign is with the leg

(Testimony of William Robert McMurray.)

all the way up and the foot then pulled back toward the thigh. It's effective. It did not produce any pain in either his leg or his back. Other hip motions are essentially normal. Patrick's test is questionably positive on the left. That is a test to the hip joints, and it consists of putting your heel in the opposite knee and rolling the leg and if there is hip trouble you will usually have some difficulty. The knee and ankle reflexes are physiological. Babinski is negative. Motor power of the lower extremities appears normal.

I felt his movement in his lower legs was essentially normal. I found no evidence of any paralysis. There is no weakness of either great toe on dorsiflexion. That is pulling the foot this way (indicating). He walks well on his toes and heels. Patient is able to perceive a difference between the sensation of a pin being sharp and that was what you would call normal and a light touch with cotton which I found was also normal.

Knees, there is normal range of motion in both knees. There is minimal crepitus, that is grinding within [6] the knee, but there is some essentially normal clicking. There is no effusion. That is no fluid within the joint. There is slight medial instability. That's instability on the inside aspects of the knee in both the right and the left. The ligaments of the knee were intact. I did not find any locking in of the knees in going through the various tests.

Q. Now, doctor, there is a chart, an anatomy

(Testimony of William Robert McMurray.)

chart on the other side of that, of the board there. I wonder if you would just bring that out so the doctor could see it?

Mr. Gearin: Well, your Honor, we have no objection to the identity of the exhibit which is now proffered, but I would object to its use unless Dr. McMurray feels it's necessary in order to explain his testimony to use the medical chart.

The Witness: Is it up to me to answer?

The Court: What would you advise?

The Witness: I would say that it is not absolutely necessary but it would be some help in describing the area. I think it would help localize the area involved.

The Court: Very well, bring out the chart. Has that chart been marked as an exhibit?

Mr. Rerat: Yes, sir, that's marked, your Honor, as Plaintiff's Exhibit 10.

Mr. Gearin: May I ask that it be received in evidence [7] then if it's going to be used?

Mr. Rerat: Fine, we have no objection.

The Court: All right, Plaintiff's Exhibit 10 for identification is admitted.

(Whereupon, Plaintiff's Exhibit 10, having been previously marked for identification, was received in evidence.)

Mr. Rerat: Now, Dr. McMurray, will you explain the human spine to us, please?

Mr. Gearin: Well, now, we would object to that, your Honor. There is only testimony of injury to

(Testimony of William Robert McMurray.)

the low back, and I think it would be highly improper to have the doctor testify with respect to the other parts of the body.

The Court: Sustained. This case is taking more time than we figured. Confine your testimony to the part of the body that is involved in this case.

Q. (By Mr. Rerat): Yes, sir. Now, will you just explain the lower part of the back, doctor, that I believe you sometime refer to as the lumbar region?

A. Yes, this is a front on view and that is the lumbar vertebrae, the first, second, third, fourth and fifth lumbar vertebrae. This being the low back, this being the sacrum to the back part of the ring of the pelvis. From the side this is again the sacrum, this is the fifth and so on back up to the first. This white portion between the [8] fifth and the fourth vertebrae is a gristle or a shock absorber which is between each of these vertebrae in this area.

Q. Now, doctor, the number one vertebra is located where in the lumbar region?

A. This is the third, second, first, it would be right here (indicating).

Q. And there are how many lumbar vertebrae?

A. Five in the normal spine.

Q. Then the white space between the boney substances are called what?

A. Intervertebral disks.

Q. And what is the purpose and function of an intervertebral disk?

(Testimony of William Robert McMurray.)

A. Well, I think I can best liken it to a shock absorber. In other words, if you have bone piled on bone and step off of a step, it would be very, very jarring, but this is a shock absorber in the human body which takes up the shock between the bones and the stresses and strains that are put on the back.

Q. Now, doctor——

A. It's a path of cartilage in there between them.

Q. Now, doctor, where did you find the incision in the back?

A. Well, let's see, it is a picture from the back. There is two, one extending over the, say between here (indicating) [9] and here right in the mid-line and there is one at the side that the bone was taken from, the bone for the spinal fusion that this man had was taken from the left hip bone which is called the ilium. It was taken in here (indicating) right in here (indicating). It was taken from here (indicating) and put in here (indicating).

Q. All right. Doctor, will you be seated there?

Mr. Gearin: Are you through with the chart, counsel?

Mr. Rerat: Pardon?

Mr. Gearin: Is the doctor through with the chart, may I ask?

Mr. Rerat: Well, just for the time being, yes. Would you put it back, please?

The Court: You may just move the stand, Mr. Bailiff, and we will proceed.

(Testimony of William Robert McMurray.)

Q. (By Mr. Rerat): Now, doctor, I'd like to call your attention to the hospital records of the Good Samaritan Hospital that were offered and, oh—I don't believe they were, they have been offered yet, but I would like to offer the hospital records and the X-rays.

Mr. Gearin: I have never seen them, your Honor. I would like the opportunity of at least going over them. I didn't even know they were here.

Mr. Rerat: Well, the Clerk told me they were.

The Court: Now, just a moment. Have they been marked [10] as exhibits?

The Clerk: Yes, sir.

The Court: All right.

The Clerk: The hospital records are Exhibit 7 and the X-rays are 6. The X-rays have been subdivided into A, B and C.

The Court: Hand them to counsel for the defendant.

Mr. Rerat: The numbers are what?

The Clerk: Six and 7.

The Court: Is there any objection?

Mr. Gearin: We have no objection.

The Court: It is stipulated that these are hospital records of the plaintiff. Is that agreed? It is the hospital record of the plaintiff, Mr. Gearin?

Mr. Gearin: On counsel's representation that is. I have no objection to it being received in evidence.

The Court: Exhibit 7 for identification received in evidence.

(Testimony of William Robert McMurray.)

(Whereupon, Plaintiff's Exhibit No. 7, having been previously marked for identification, was received in evidence.)

Mr. Rerat: Your Honor, Exhibit 6?

The Court: What about the X-rays?

Mr. Gearin: Same thing applies, your Honor.

The Court: Exhibit 6 for identification is received [11] in evidence pursuant to stipulation.

(Whereupon, Plaintiff's Exhibit No. 6, having been previously marked for identification, was received in evidence.)

Q. (By Mr. Rerat): Now, doctor, will you just examine Exhibits 6 and 7, please, which are the hospital records?

(Documents handed to the witness.)

The Court: We will need a view box.

Mr. Rerat: Your Honor, there are some X-rays that the doctor took. If it's agreeable that they be marked and introduced, he just brought them here.

Mr. Gearin: I have no objection if I am afforded the same courtesies with our doctor.

Mr. Rerat: Well, you will be afforded the same courtesies.

The Court: Have these been marked, these X-rays?

Mr. Rerat: They just come in with the doctor.

The Court: They may be marked for identification. Hand them to the Clerk to be marked for identification. What exhibits are they, Mr. Clerk?

(Testimony of William Robert McMurray.)

The Clerk: We can continue these as 6. We have those other X-rays marked 6.

Mr. Rerat: I would rather have them marked another number if we may.

The Clerk: Eleven is the exhibit number. [12]

(Whereupon, X-rays were marked Plaintiff's Exhibit No. 11 for identification.)

The Court: They will be marked Exhibit 11-A, B, C and so forth depending on the number.

The Witness: There are quite a few. That's upside down, but that's the chest. Did you want me to say anything about these?

Q. (By Mr. Rerat): Well, doctor, what I would like to have done first, they are marking the X-rays that you took, and I would like, as soon as they are marked, like to have you interpret them for the benefit of the Court.

A. I'd better say one thing about those two X-rays, your Honor. One set which I had taken and there is another set which accompanied the patient to my office which were taken previously to mine.

The Court: Does the date appear on them?

The Witness: Yes.

The Court: Have you brought them all together?

The Witness: There are two envelopes.

The Court: Do you have them, Mr. Clerk?

The Witness: They are the loose ones in the large envelope and those belong——

Mr. Gearin: Your Honor, I would have to ob-

(Testimony of William Robert McMurray.)

ject to any X-rays that weren't taken by Dr. McMurray.

The Court: Very well, let's segregate them, Mr. Clerk, [13] which were taken by you and which were not.

The Witness: The small ones were taken at my direction.

The Court: The small ones?

The Witness: Yes.

The Court: All right, take the large ones and mark them 11-A.

Mr. Lezak: Those are the only ones we are considering, your Honor, the ones that were taken by Dr. McMurray.

The Court: The small ones will be marked Exhibit 12-A and so forth.

The Witness: These are the ones I had taken. These are the ones to be admitted in evidence.

The Court: How many are there, doctor?

The Witness: I didn't count them, your Honor.

The Court: Well, the doctor doesn't need to count them. The Clerk can count them.

The Witness: Six.

The Court: Let's get them marked so we can move on. Mark them, Mr. Clerk, the small ones here immediately so the doctor can begin, and as you mark them one by one, hand them to the Bailiff so he can submit them to the doctor.

Mr. Rerat: How many X-rays are there, Mr. Clerk?

The Clerk: Six.

(Testimony of William Robert McMurray.)

The Witness: This is marked Exhibit 12-A. This is on Mr. Frank Reiner taken on December 19th, 1957. [14]

The Court: I suggest if you're going to show it to the jury, you stand over to the right a little way so it will take the light out of the jury's eyes. Mr. Bailiff, will you assist the doctor there?

The Witness: Do you want me to read them off?

The Court: Whatever your counsel wishes.

The Witness: This is 12-B, the same man, the same date.

Q. (By Mr. Rerat): Now, doctor, will you interpret them for the benefit of the Court and jury, please?

A. Yes, I will. This is again the lumbar spine. Plaintiff's Exhibit 12-B. This is 12-B. This is a side view of the lumbar spine taken this way (indicating). This is the fifth lumbar vertebra (indicating). This is the fourth, third and so on. This is the intervertebral space between the first lumbar vertebra and the sacrum, this being the sacrum, this being the intervertebral disk. This is narrow as compared with the other intervertebral spaces. This man has had a spinal fusion from this portion of his sacrum, the second sacral segment including the back or posterior part of the fifth lumbar vertebra. It is impossible to say for sure from the X-rays whether or not there is involvement of the fourth lumbar vertebra, this being a spinous process in the back, it is impossible to interpret from these X-rays

(Testimony of William Robert McMurray.)

whether or not there is fusion involving this. But there has been a [15] fusion definitely from the fifth lumbar vertebra to the sacrum. May I see some more films, please? This is 12-C. This is a film taken bending forward. I might as well identify those all and get it over with, then I can go on. This is 12-D, again another view, same view. This is 12-E, this is an X-ray. These were shots taken for the specific purpose of showing this area (indicating). It shows the entire spine, the entire lumbar spine and 12-F. This is the front on view as I told you in the diagram. That is the sacrum, that is the lumbar spine, that is the fifth lumbar vertebra. The area of the fusion is here (indicating).

Q. Now, Doctor, when you speak of a fusion, will you tell us just what is meant by a fusion and where the fusion appears on the exhibits that you have been showing us?

A. What is meant by a fusion, spinal fusion consists of stiffening two or more bones. This is stiffening between this bone (indicating) and this bone (indicating). This is a spinal fusion within the fifth lumbar vertebra and the sacrum. The purpose being to make this segment of the spine immobile.

The Court: You are referring to Exhibit 12-F, are you, Doctor?

The Witness: Well, this happens to be 12-C, your Honor, and this one happens to be 12-B. These particular films were [16] taken with the patient in forward flexion and the other with the patient bend-

(Testimony of William Robert McMurray.)

ing backward to ascertain whether there is any motion. Whether this fusion is a fusion or whether there is motion. This is not a solid fusion. There is absorption of the bone graft. The bone for the bone graft is taken through the second incision over the back of the left hip, that bone is taken in the form of small chips and laid in there and then it is allowed to unite into the back and produce the fusion. In this case there is absorption, as you see here (indicating) there appears to be absorption of some of the bone graft. This was taken with the patient bending forward. This is 12-B. This is 12-C (indicating), taken with the patient bending his back, and this one is bending forward and shows with the patient bending, with these two exhibits that at the site of the fusion that this is opened up here (indicating), and this is closed (indicating). There is motion at the fusion site.

Q. Doctor, may I just ask you this question: Where was the—what is the significance of that that you told us about, the movement there at the site of the fusion?

A. Well, the significance is this man, I have reviewed, I have seen the hospital charts, the diagnosis on the hospital chart, the reason for doing the fusion in the operating doctor's opening was for an unstable low back. The purpose in doing a fusion is to produce stability in the area and [17] this is not, this is not stable at the fusion site. He has motion on X-rays.

(Testimony of William Robert McMurray.)

The Court: Are you finished with the light, Doctor, please turn it out?

Q. (By Mr. Rerat): All right, Doctor, will you take the stand now? Doctor, it's been testified to here that Mr. Frank Reiner, the plaintiff, is a man—was a man fifty-seven years of age; that he worked for the railroad company, the Northern Pacific Terminal Company, and as a pilot herder switchman that on February 6, 1955, while he was working for this company there was a collision between a two-Diesel unit that he was on and a string of boxcars and that at the time of the impact he was thrown about the cab, first frontward, backward and then side to side and that he was dazed and that while the movement of the Diesel engine that he was on was still in progress, that he jumped out from the Diesel engine to the side and that as a result of being—as a result of what happened in the cab and his jumping, that he received an injury to his left leg and knee and his right knee and also to his left hip and back and he had pain immediately in those places. After the accident, most of the pain was in the left leg and hip. He was taken to the hospital, was there for several hours and then taken home and he remained home for quite some time and he had continuous pain and he was treated by a [18] doctor and he had hot packs put on his leg and hot applications on his back by his wife; that on March the 31st that he was taken to the hospital, the Good Samaritan Hospital, and for about fourteen or

(Testimony of William Robert McMurray.)

fifteen days he was under—he was in traction on both legs and he remained in traction for fourteen or fifteen days at the Good Samaritan Hospital, but the pain persisted and then in June of 1955 he attempted to work for a couple of weeks under difficulty; when he finished work, he would go home and go to bed. He had constant pain in his back and his left leg all this time. I believe then in October of 1955 he was taken to the hospital, the Good Samaritan Hospital, again, and a fusion operation was done by Dr. Mundal and Dr. Carlson. Now, Doctor, assuming, and then that he has had, after that he was in the hospital for about twenty some days; that he had a back brace put on, or, rather, a sold plaster of paris cast at that time which was on until some time in January of 1956 and when that was taken off and then he was given a metal brace. He has had pain in the back since the accident up to the present time and down the left leg and he says the pain is worse sometimes than other times. Now, Doctor, he also testified that in 1952 while he was hunting he twisted his left knee and also he got cold and his back bothered him for a period of about thirty or forty days. I think he was out of work during that period of time. He was released by the doctor and [19] from 1952 up until the time of this accident he didn't have any trouble of any kind with his back. He took an examination by the company doctor during that period of time in the past, and then assuming that testimony to be true,

(Testimony of William Robert McMurray.)

Doctor, and also the fact that prior to '52 he had an injury to his left toe which he was out about twenty some days from work and other than a cold or slight backache he had no trouble with his back except the instance that I speak of or the instances that I speak of 1952; and then in this accident of February 6, 1955. Now, Doctor, assuming that testimony to be true, and taking into consideration the hospital records that you have seen, that are in evidence here, and taking into consideration, Doctor, the examinations that you have made of Mr. Reiner and the X-rays that you took that have been received in evidence together with your medical learning and experience as an orthopedic surgeon, Doctor, have you an opinion as to whether the accident that he was in on February 6th, 1955, is the cause of his present disability that he is suffering from, have you an opinion, Doctor?

A. Yes; assuming that everything——

The Court: You have answered it. Did you have an opinion?

The Witness: Yes; I have an opinion.

Q. (By Mr. Rerat): And what is your opinion, Doctor?

A. Well, my opinion is, that assuming that all the history is as written, that the accident of—whenever it was, I [20] think is was '55——

Q. February the 6th.

A. ——would be the cause of his present troubles, yes.

(Testimony of William Robert McMurray.)

Q. Doctor, assuming the same facts, without going into all the facts that I went into before, I imagine you have them in mind, to be true, have you an opinion, Doctor, as to whether the accident of February 6, 1955, was the cause for the fusion operation that was done in October of 1955?

A. Yes.

Q. And what is your opinion, Doctor?

A. I think that was the cause of it.

Q. Now, Doctor, such a condition that you found Mr. Reiner suffering from, from your physical examinations, also from the X-rays that you had taken of his back, is such a condition, Doctor, you found him suffering from the painful nature—strike that. Doctor, is such a condition that you found him suffering from a cause for pain?

A. Yes; it is.

Q. And will you just explain that to the Court and jury, please?

A. Well, this man has had a spinal fusion. He has motion in the spinal fusion. In reviewing the X-rays, it appears to me that the spinal fusion is impinging, actually on the fifth lumbar vertebra, but I believe this man's fusion is impinging on the fourth lumbar vertebra which is not actually [21] incorporated in the spinal fusion. I believe there is pain at that site. I believe there is pain also from the lack of the spinal fusion. There is motion in that area at the present time.

Q. Now, take into consideration—considering

(Testimony of William Robert McMurray.)

your examinations of this man and the condition that you find him in at this time, have you an opinion as to whether or not he is permanently and totally disabled from doing the work of a railroad switchman or a pilot herder, which is some light work and heavy work on the railroad?

A. Yes; I have an opinion.

Q. What is your opinion, Doctor?

A. I don't think this man, with his back in the present condition it is now, is fit for heavy work.

Q. And, Doctor, have you an opinion as to the pain that he has been suffering from since the time of the accident up to the present time is of a permanent nature? A. Yes.

Q. What is your opinion?

A. Yes; I have an opinion. This is a permanent situation.

Mr. Rerat: You may cross-examine, counsel.

Cross-Examination

By Mr. Gearin:

Q. Dr. McMurray, you gave an opinion based upon the hypothetical question, did you not? [22]

A. Yes.

Q. And you accepted some facts as being true?

A. Yes.

Q. All right. And that's what you base your opinion upon? A. Yes.

Q. Did you also take a history from this man?

A. Yes, I did.

Q. Did he tell you that he had worn a back brace as early as 1952?

(Testimony of William Robert McMurray.)

A. No, he did not tell me that.

Q. Did you ask him about prior back trouble?

A. Yes, I did.

Q. And what did he tell you about prior back trouble?

A. I want to review my record if I may, please.

(Documents handed to the witness.)

The Witness: For two years prior to February 6, 1955, he had experienced occasional low back pain which had been diagnosed as lumbago. He had been told he had arthritis in his spine. His back never had bothered him so that he was forced to lay off work. However, he had lost some time as a result of a previous knee injury. I am not——

Q. (By Mr. Gearin): Doctor——

A. I am not quite through with his early life. I have a little bit more here, I think. As I understand it, he complained of lumbago for approximately a month in '52, [23] and in regard to his back injury he had been released from the doctor's care.

Q. Now, doctor, we know from the hospital records that Mr. Reiner had an unstable fifth lumbar vertebra. Is that accompanied by pain to the low back?

A. It usually is, yes.

Q. And that's right in here (indicating)?

A. Yes.

Q. All right. And that's where some people say they've got lumbago situated in there too?

(Testimony of William Robert McMurray.)

A. Yes, that's right.

Q. All right. Now, you asked him about that, didn't you?

A. What do you mean?

Q. How his back had been bothering him?

A. Yes. In other words, I took a history from him.

Q. Why did you do that, doctor?

A. Well, we do that on every patient. You take a history from everybody who comes in; usually to get the information you must find out what the man's complaints are. The past history is taken for purposes of determining the complaints and to ultimately form your final opinion. The other things are mainly to make a determination. I mean it's part of what we do normally.

Q. Perhaps you misunderstood me, Dr. McMurray, I asked you specifically why did you ask Mr. Reiner if he had any [24] back trouble to his back before?

A. I was dealing with a back problem.

Q. Now, when you have an unstable fifth lumbar vertebra, that means it doesn't sit very well on each other, doesn't it?

A. That's right.

Q. Now, that condition may be congenital?

A. Yes.

Q. That means the person is born with it?

A. Yes.

Q. Or it may be the result of injury?

A. Yes.

Q. And it may be the result of a heavy, violent sneeze?

(Testimony of William Robert McMurray.)

A. Oh, usually there would be a predisposing cause for just that much injury.

Q. A person can get it by lifting something heavy? A. Yes, that's true.

Q. And one of the standard means of treating an unstable fifth lumbar vertebra is to put a person in a back brace? A. Yes.

Q. All right. And did you feel that he had an unstable fifth lumbar vertebra prior to the accident in February of 1955?

A. I could have no opinion on that because I didn't see this man until January of this year.

Q. All right, sir. Now, when you say you mentioned something [25] before, doctor, about no spasm, now, as I understand it, spasm is nature's way of muscle protection against pain?

A. That's true.

Q. And you said Mr. Reiner could touch 8 inches from the floor; is that pretty good for a fifty-nine year old man? A. That's pretty good.

Q. Do you feel that the man could go hunting and fishing now?

A. Well, that's a pretty general question. What kind of hunting and what kind of fishing? I don't think he would be able to carry a 200 pound buck out of the woods, but he does go hunting.

Q. Sure. You say he was ambulant without difficulty. That means when he walks, he walks normal? A. Yes.

Q. I mean, he doesn't have a guarded gait or shuffling? A. No.

(Testimony of William Robert McMurray.)

Q. All right. Now, doctor, sometimes we have an unstable fifth lumbar vertebra, regardless of cause, that gradually becomes worse, and on such a condition a fusion is indicated regardless of an accident, don't we? A. Yes, that's true.

Q. That's just part of a general gradual process of growing old? A. It could happen.

Q. Doctor, may I see your notes, please? [26]

A. Surely.

(Documents handed to counsel.)

The Court: Will you be some time?

Mr. Gearin: Yes, your Honor.

The Court: We will take a five minute recess. Ladies and gentlemen, you are excused for that period subject to the usual admonitions.

(A short recess was had.)

The Court: You gentlemen will stipulate that the jurors are all present?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: Yes, your Honor.

Q. (By Mr. Gearin): Dr. McMurray, did you find from your review of the X-ray pictures any evidence of arthritis in the man's low back?

A. Yes, he has arthritis in his low back.

Q. All right. Does his arthritis cause pain in the low back? A. It can, yes.

Q. And for how long a period of time would you say that this man has had arthritis in his low back?

(Testimony of William Robert McMurray.)

A. I can't say exactly. I can say this, that his arthritis, his arthritis pre-exists the present condition. He has had arthritis for a long time, but as far as putting it down as to months or years, I couldn't do that.

Q. Would you say he had this arthritis before the accident? [27] A. Yes.

Q. Now, Dr. McMurray, you saw the man on just one occasion? A. Yes.

Q. In your office? A. Yes.

Q. All right. And for how long a period of time did you examine him?

A. Approximately an hour to an hour and fifteen minutes.

Q. And you have written a lengthy report, as I have noted? A. Yes.

Q. And you had a pre-trial conference with Mr. Lezak and with Mr. Rerat, the plaintiff's attorneys?

A. Yes.

Q. How much time did you spend in preparing to testify and preparing your report in reference to making your examination?

A. I spent an hour and fifteen minutes examining him and about an hour and a half with the attorneys.

Q. All right. And then in addition the time of dictating your report? A. Yes, that's right.

Q. Now, you say that you are on the staff of a hospital. Does that mean that you are entitled to practice at that hospital? A. Yes.

Q. And every doctor, say up at St. Vincent's,

(Testimony of William Robert McMurray.)

that can take [28] patients there is on the staff?

A. Yes, that's true.

Q. And as far as the teaching at the medical school is concerned, the clinical instructor, that is a person who is in private practice and goes up there and teaches maybe a short period of time, a week or a month?

A. Yes, that's true.

Q. About how many clinical instructors do they have there at the University of Oregon Medical School that are not on the regular staff?

A. You mean that aren't full time men up there?

Q. Yes. A. Gosh, I don't have any idea.

Q. There would be a great number of them?

A. Well, taking into consideration all the departments, yes, uh huh.

Q. And you're not paid for that, are you?

A. No.

Mr. Gearin: Thank you, I have no further questions.

Redirect Examination

By Mr. Rerat:

Q. Now, doctor, when we speak of arthritis, will you tell us whether or not, when people reach a certain age that that's a normal situation to find arthritis in a back?

A. Yes, that's true. Most people over forty have some [29] arthritis.

Q. And, doctor, can a person having a condition of arthritis live a normal life without any pain if

(Testimony of William Robert McMurray.)

they are not caused to come in contact with what you might call trauma? A. Yes.

Q. Yes, and can trauma or injury, doctor, aggravate a pre-existing arthritic condition?

A. Yes, it can.

Mr. Rerat: That's all, doctor.

The Court: You may step down, doctor.

(Witness excused.) [30]

CHARLES L. CURTIS

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. Charles L. Curtis.

Q. Where do you live, Mr. Curtis?

A. In Portland.

Q. How long have you lived in Portland?

A. My entire life.

Q. How old a man are you?

A. Thirty-eight, sir.

Q. By whom are you employed?

A. Northern Pacific Terminal Company of Oregon.

Q. In what capacity? A. A switchman.

Q. How long have you worked for the Northern Pacific Railway Company—Terminal?

A. Seventeen and a half years.

(Testimony of Charles L. Curtis.)

Q. You are still working for them, are you?

A. Yes, sir .

Q. Will you state whether or not you are qualified as a pilot-herder?

A. Yes, sir, I am qualified. [91]

Q. Do you know what the duties are of a pilot-herder?

A. Yes, sir.

Q. Will you tell us what they are?

A. The duties of a pilot-herder are to cut off passenger engines from passenger trains and couple them on, couple the engines on the passenger trains, couple and uncouple cars at the high shed when necessary and, well, that's about the size of it, I would say.

Q. Does the pilot-herder—I believe we have used the word “pilot-herder switchman” and the last witness said it meant the same thing so I will use the word with you, “pilot-herder”—does the pilot-herder have anything to do with the operation of the headlight on the diesel unit?

A. No, sir.

Q. Does he have anything to do with the operation of the windshield?

A. No, sir.

Q. Does he have anything to do with the lowering of windows so that the engineer or fireman can get a better view?

A. No, sir.

Q. Does he have anything to do with the working of any of the gadgets as far as a locomotive diesel engine is concerned?

A. No, sir.

Q. Who has the responsibility of keeping a lookout for obstructions on a track in the movement of a double diesel unit? [92]

(Testimony of Charles L. Curtis.)

A. Well, your engineer and fireman would.

Q. Well now, does the pilot-herder have any, does he have any responsibility, or does he have the responsibility of looking for obstructions on a track?

A. Well, if he was in the position, sir, he should be alert and——

Q. In other words, the general rules of railroad-
ing are safety first, if possible? A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Regardless of what kind of work you are doing, of course, it is up to all individuals, if it is possible, to use—to follow the safe course?

A. That is correct, yes.

Mr. Rerat: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Curtis, in a movement in which a pilot or pilot-herder is in the rear of a diesel unit which is making a backward movement, backward move, would you say that it would be the duty of such individual to keep an alert lookout?

A. If that were, if he would be in a position to do so.

Q. Yes, if he was standing in front of the window during a back-up movement, he should be keeping a lookout?

A. Well, it depends on if he was in position to see that, yes. [93]

Q. If he was in such a position, would it be his obligation and his duty to keep a lookout?

(Testimony of Charles L. Curtis.)

A. Why, yes.

Q. Is it the duty of the pilot-herder to protect the crossings?

A. Well, if—in a back-up movement such as that?

Q. In any movement.

A. Not public crossings, no.

Q. All right, in a back-up movement would it be his duty to protect a crossing?

A. It would be if there was nobody else in the cab, yes.

Q. Would it be his duty to protect the rear end?

A. As far as flagging is concerned, do you mean, or——

Q. Well, just the words, “protecting the rear end.”

A. Well, yes.

Mr. Gearin: That is all. Thank you, sir.

Mr. Rerat: That is all. Thank you, Mr. Curtis.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Rerat: Call Mrs. Reiner. [94]

MARGARET REINER

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name, please?

A. Mrs. Margaret Reiner.

Q. Where do you live, Mrs. Reiner?

A. At 2035 Southeast Ellis Street.

Q. You are the wife of the plaintiff in this case, Frank Reiner?

A. Yes, sir.

Q. How long have you two people lived in Portland, Oregon?

A. Approximately 36 years.

Q. How long have you been married?

A. Forty-one years.

Q. During the time that you have been married, Frank, your husband, worked for the Northern Pacific Terminal Company?

A. Pardon me. I didn't hear you.

Q. I say, your husband worked for the Northern Pacific Terminal Railway Company?

A. Yes, sir.

Q. On February 6, 1955, was he in a railroad accident?

A. Yes, sir.

Q. Up to that time, he worked for the railway company for [95] about how long?

A. Thirty-six years.

Q. Do you recall that evening, the night of February 6, 1955, when he came home?

A. Yes, sir; I do.

(Testimony of Margaret Reiner.)

Q. Who brought him home?

A. My son-in-law and I helped him up the steps.

Q. When he got in the house, will you just describe his appearance to us, please?

A. Well, he was very pale, and, well, he was aching all over, and hurt.

Q. What did you do for him then?

A. I put on some hot packs for him immediately and gave him some anacins to relieve the pain, and he was in misery all night, and from there on for a long time.

Q. What did you notice, if anything, about his left leg? A. It was all swollen.

Q. Would you tell where the swelling started and where it ended?

A. Well, from above the knee on, clear on down.

Q. Where did you put the hot applications on?

A. On his, above, well, from his hip on, clear on down to his foot, and electric——

Q. Did you put on any hot pads or any pad any place else?

A. And an electric pad on the back. [96]

Q. The next day was the doctor called?

A. Yes, we called him, and he was not able to come out right away, but he told me what to do, and, of course, I had been putting the applications on anyway.

Q. Do you recall when the doctor did come out?

A. Pardon?

Q. I say, do you recall when the doctor did come out? A. Yes.

(Testimony of Margaret Reiner.)

Q. When was it about?

A. Well, do you mean what time of the day?

Q. No, when did he come out after the sixth?

A. Oh, it was around the tenth.

Q. That was Dr. Mundall? A. Yes.

Q. When Dr. Mundall—before he came out, how did your husband get around the house when he wanted to go to the bathroom?

A. Well, he had to use crutches. He just couldn't put his weight on his foot at all.

Q. Now then, did your husband continue under the care of Dr. Mundall? A. Yes, sir.

Q. Then he entered the hospital, did he, the Good Samaritan Hospital? A. Yes, sir. [97]

Q. He was in the hospital several times between that time and the present time; is that correct?

A. That is correct.

Q. What care and attention have you given your husband since the accident up to the present time?

A. Applications, a lot of applications.

Q. Where?

A. Practically every day to ease up the pain.

Q. Where do you give him these applications, Mrs. Reiner?

A. Well, below both legs and the electric pad on the back.

Q. The record shows your husband entered the hospital for the fusion operation in October of 1955, and was there about twenty-nine days?

A. That's right.

Q. Or twenty some days. Did you see him in

(Testimony of Margaret Reiner.)

the hospital? A. Every day.

Q. Since he has been home and up to the present time have you still continued to put the hot pad on his back? A. Yes, I have.

Q. The hot applications on his leg?

A. Yes, sir.

Q. During the time that your husband worked for the railroad company prior to February 6, 1955, what was his general condition of health?

A. Well, I would say it was good. [98]

Q. Do you recall an incident in 1952, I think it was, where your husband twisted his knee when he was hunting? A. That is correct.

Q. He also had a lumbago in his back?

A. Yes, he had taken up quite a bad cold.

Q. At that time do you recall that the doctor prescribed a corset for him to wear?

A. Correct.

Q. How long did he wear that?

A. I don't imagine it was over six weeks.

Q. Do you recall how long that he was out of work at that time?

A. Not just exactly but not very long. It was——

Q. Well, from—I am sorry, I didn't mean to interrupt you. What was that?

A. I don't remember just exactly how many days he was off at the time.

Q. Then from that time, from 1952 up until the time that he had this accident, February 6, 1955, had he had any trouble with his back if he worked steady? A. No, sir.

(Testimony of Margaret Reiner.)

Q. Before that time, that would be 1952, from the years he worked with the company did he work steady for the company? A. Yes, sir. [99]

Q. There was some discussion about your husband hunting and fishing. Since the accident has he gone out hunting? A. We have gone, yes.

Q. When you say "we" you mean what?

A. Well, my husband and son.

Q. Your son is how old, Mrs. Reiner?

A. He is thirty-three.

Q. Thirty-three. He is working for the Northern Pacific Terminal Railroad? A. Correct.

Q. When you had gone out hunting, you say you would go with your husband?

A. That is correct.

Q. Will you tell us what his activity has been during the occasions that he has been out?

A. Well, we like the outdoor life, but just since the accident he has not, he isn't able to do those things like he used to, just goes and sits some place, and if he is lucky, well all right, but he has not been lucky so we didn't get anything.

Q. Also there was something said about catching a salmon. A. That is correct.

Q. A 31-pound salmon?

A. Correct, I netted it.

Q. You were with him at that time? [100]

A. Correct.

Q. You were the one that netted it?

A. Correct; very proud of it.

(Testimony of Margaret Reiner.)

Q. When you on other times got out in the fresh air and sunshine, would you have gone with your husband on those occasions?

A. Correct; yes, sir.

Mr. Rerat: I think that is all.

Cross-Examination

By Mr. Gearin:

Q. Mrs. Reiner, you say your husband has difficulty getting around since the accident?

A. Well, he has been hurt, as you know.

Q. Has it been difficult for him to get around?

A. Yes, it has.

Q. You have been in the courtroom yesterday and this morning?

A. Pardon?

Q. You were in the courtroom yesterday?

A. I don't understand that.

Q. Were you here in this courtroom yesterday?

A. Yes, sir.

Q. And we have noticed that Mr. Reiner has some difficulty walking? [101]

A. That is correct. That's just the way he feels, just like you see him walking.

Q. All the time?

A. Yes, sir.

Mr. Gearin: I have no more questions. Thank you.

The Witness: That is not put on.

Mr. Rerat: That is all, thank you, Mrs. Reiner. Your Honor, the plaintiff rests.

Mr. Gearin: May I have five minutes, your Honor?

The Court: Yes. We shall take the morning recess at this time. You are excused for five minutes, subject to the usual admonition, Ladies and Gentlemen.

(Thereupon, the Jury retired.)

(A five minute recess being had, and the Jury having returned to the box, the following proceedings were had:)

The Court: Is it stipulated, Gentlemen, that the Jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: You may proceed.

Mr. Rerat: If your Honor please, at this time I would like to have permission of the Court to reopen to just clarify one of the rules of the company that has been testified to here that I was not familiar with until just after recess. [102]

The Court: You may.

Mr. Rerat: Mr. Leap, will you take the stand again?

JOHN F. LEAP

recalled, having been previously sworn, testified as follows:

Direct Examination

By Mr. Rerat:

Would you hand the witness this book, please, Mr. Bailiff?

(Book presented to the witness.)

Q. Mr. Leap, I think you were asked and you

(Testimony of John F. Leap.)

did read Rule 106, and in that rule 106 it refers to a pilot. You are familiar with that?

A. Yes, sir.

Q. In the rule 106 that you read?

A. Yes, sir.

Q. Now, is the pilot that is included in that rule the same as a pilot-herder? A. Well, no.

Q. Is there a definition in the rule book of the company of a pilot? A. Yes, sir.

Q. Will you turn to that and just read that, please?

A. "A pilot is an employee assigned to a train when the engineer or conductor or both are not fully acquainted [103] with the physical characteristics or rules of the railroad or a portion of the railroad over which the train is to be moved."

Mr. Gearin: That is on page 8.

Mr. Rerat: We offer that part of the rule in evidence.

Mr. Gearin: I thought all the rules were in evidence.

Mr. Rerat: I think, Counsel, you are right on that so it will not be necessary.

Q. When a train stops, or rather when a unit of two diesel engines is proceeding on a main-line track going in a southerly direction and a stop is made by the engineer without the knowledge or consent of the pilot-herder, and a reverse movement is going, is supposed to be made—under those conditions, what would it be necessary for the pilot-herder to do?

(Testimony of John F. Leap.)

A. Could we have the question read?

Q. Do you understand it, or do you want me to repeat it? A. You can clear it up.

Q. Assuming that two double units, a diesel double unit is traveling south, and we will say it stops at 17th Street unbeknown to the pilot-herder, and then a reverse movement is made—is to be made against the traffic. What would it be necessary for the pilot-herder to do under those circumstances?

A. Well, first he should be informed of the movement. [104]

Q. Yes.

A. And then he would get out of the units wherever he might be and go back along the track to protect the movement, the reverse movement of the units.

Q. Is that the customary and usual way of doing that?

A. Yes, protecting the train, the engines, in that manner, yes.

Mr. Rerat: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Leap, Counsel ask you in the first part of the question about the train being stopped without the knowledge or consent of the pilot-herder. The pilot-herder has some position of authority, does he not, which would, do you say, require him to give his consent to this? A. No.

(Testimony of John F. Leap.)

Q. In the back-up movement such as this, he would have some obligation to protect the reverse movement, would he?

A. If he knew it was going to be made; yes, sir.

Q. And if he were told that they were backing up, he would have an obligation to protect the back-up movement? A. Yes.

Mr. Gearin: Thank you, sir; no further questions.

Mr. Rerat: That is all; no further questions.

The Court: You may step down. [105]

(Witness excused.)

Mr. Rerat: Your Honor, now the plaintiff rests.

The Court: Plaintiff rests. Mr. Gearin, you may proceed.

Mr. Gearin: We will call Mr. Moore. [106]

LEO B. MOORE

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Moore, you were a hostler helper on this train in which Mr. Reiner was the pilot-herder?

A. Yes, I was.

Q. At the time the accident we have been talking about happened? A. Yes.

Q. Prior to that time where had you been riding on the train? A. In the forward cab.

(Testimony of Leo B. Moore.)

Q. As you came in toward the Union Station, what happened?

A. We stopped at 17 crossing and I went—they gave a “back-up,” told me to go to the rear unit and tell them we was going to back up and have the train placed to come back in reverse, and so I did.

Q. All right, did you go back to the rear end?

A. Yes.

Q. Who was there?

A. Mr. Reiner and Ray.

Q. You said Ray—Bray? A. Bray. [107]

Q. What was Mr. Reiner’s position at this time?

A. He was sitting in the engineer’s seat.

Q. What was his job classification? What did they call him? A. He was a herder.

Q. What is Mr. Bray’s classification?

A. He is a boilermaker.

Q. Did you at that time have a conversation with Mr. Reiner? A. I did.

Q. What did you tell him?

A. I told him we was going back to 20th Street and make another trial.

Q. Was anything said about the rear headlight?

Mr. Rerat: I object to that as leading and suggestive.

The Court: Overruled.

Q. (By Mr. Gearin): What, if anything was said about the rear headlight?

A. Yes, I walked back, he was sitting there, and where it was—the cab light was on, and then I

(Testimony of Leo B. Moore.)

asked where the headlight switch was as I couldn't see in the row of buttons, and I turned it on bright, and he says, "You don't make a reverse movement with the bright headlight on," so I then clicked it to dim.

Q. What, if any, effect would that have upon the visibility to the rear? [108]

A. Well, when the headlight was on bright I could see all the switches all the way back was all clear, and when the headlight was clicked to dim you could only see the car in your unit in front of you.

Q. Now, on the back-up movement who, if anybody, in the back of the unit in which you were riding was responsible for the movement?

A. The herder.

Q. Who would that be in this case?

A. Mr. Reiner.

Q. Who had responsibility for the—strike that—what, if any, authority did you have with respect to Mr. Reiner's duties and activities at that time and place?

A. Nothing at all.

Q. Did you rely upon anyone for the conduct of the movement, and if so whom?

A. Mr. Reiner——

Mr. Rerat: Just a minute, please. Your Honor, that is objected to as leading and suggestive and incompetent.

The Court: Overruled. You may answer.

Mr. Gearin: Would you read the question?

(Last question read.)

(Testimony of Leo B. Moore.)

The Court: I will reverse the ruling. I will sustain the objection in that form.

Q. (By Mr. Gearin): Did you station yourself for a look out [109] for the rear movement?

A. I did when I turned the headlight up on bright. As I looked, it was clear, and I gave the three bells to come back, and then Mr. Reiner was in the vision, see.

Q. Then he got into the seat?

A. He was in the seat at all times.

Q. All right. Now, after you gave the three-buzzer signal, what happened then?

A. Well, he said, "Turn the light to dim," and I did, and we went, oh, I would say an engine length, and I felt a log in the engine, and I said, "Boxcars," and I jumped for the buzzer as it was the closest thing to me for a stop signal, and then I missed, and we hit, and I dove for the floor.

Q. How large were the units that you had there?

A. They were approximately, over-all, I imagine 40 feet or better.

Q. Where is the buzzer located?

A. The buzzer is located in front of the control panel.

Q. I am handing you Photographs 25-A, -B, -C, down to -J and ask you if you can identify those. I have shown these to counsel already, your Honor.

The Court: Are they in evidence?

Mr. Gearin: No, sir.

The Witness: In this picture is the speedome-

(Testimony of Leo B. Moore.)

ter [110] showing and the fireman, and the hostler seat.

Q. Does that show the inside of a Diesel unit?

A. Yes, that is the inside of the unit.

The Court: What number is this?

The Witness: Twenty-five-R.

The Court: Twenty-five what?

The Witness: R, isn't it? Is this the number?

The Bailiff: B.

The Witness: Oh, B, pardon me.

Q. (By Mr. Gearin): Do you have a picture there showing where the buzzer is located? Would you look at that, please, Mr. Moore?

A. Yes, this one shows the buzzer.

Q. All right, would you take this red pencil and please put a circle around the buzzer?

The Court: "This" is numbered what?

The Witness: Twenty-five-A.

Q. (By Mr. Gearin): With regard to the photographs, do they show the inside of the locomotive, I mean of the Diesel engine? A. Pardon?

Q. Do they show the inside of a Diesel locomotive? A. This one does, yes.

Q. All right now, there are some that do not. Do you know what they are? [111]

A. This is leaving the Lake Yard here.

Q. Do you know from what type of engine that is taken from? Can you tell?

A. This is a switch engine here leaving the yard.

Q. Well, I mean from what kind of an engine was that taken, if you know?

(Testimony of Leo B. Moore.)

A. Oh, I don't offhand recollect the name of it.

Q. Now, the pictures of the inside of a locomotive or engine, was that the same kind as you had that night?

A. Yes, it is.

Mr. Gearin: We will offer this in evidence, your Honor, only showing mostly the inside of the cab.

Mr. Rerat: I have seen the pictures, your Honor. No objection.

The Court: Exhibits 25-A to -J will be received in evidence.

(Thereupon, photographs previously marked Defendant's Exhibits 25-A through -J, inclusive, for identification, were received in evidence.)

Mr. Gearin: I have no further questions.

Cross-Examination

By Mr. Rerat:

Q. Mr. Moore, as I understand it, you were a foreman that night; were you not? [112]

A. I was the helper.

Q. Yes, well, you were called a fireman, and Mr. Meyers was the engineer?

A. It is not classified as that. He is a hostler; a hostler and a hostler helper.

Q. Let me ask you this. Your duties were the duties of a railroad fireman; were they not?

A. Yes.

Q. That night? A. Yes.

Q. And the duties of a hostler are the duties

(Testimony of Leo B. Moore.)

of a railroad engineer; is that correct, in the operation of the engine? A. Yes.

Q. Now, this was a double-unit Diesel; was it not? A. Yes.

Q. When you started out from the depot that evening you—there is a place in front where the fireman or the hostler helper sits, and the other place where the hostler or the engineer sits; is that correct? A. Yes.

Q. When you travel from the depot to the Guilds Lake yard, that is approximately about two miles; is it not? A. Yes.

Q. When you went down there with the engineer, the engineer [113] sits on the right side, and the fireman on the other side; is that correct?

A. The engineer is on the left, and the fireman is on the right.

Q. Yes, and that is where you maintained your position? A. Yes.

Q. When you took the unit down to the Guilds yard; is that correct? A. Yes.

Q. You have the duty of keeping a proper lookout to see that the track is clear and see that there is not any obstructions on the track, is that not correct? A. Yes.

Q. You have the same duty as the—you as fireman or hostler helper, you have the same duty as the hostler or the engineer; is that correct?

A. Yes.

Q. That was your duty, to keep a proper lookout and to operate the various mechanisms or gadgets on that train; is that correct?

(Testimony of Leo B. Moore.)

A. Yes.

Q. Now, you are familiar—will you take this, please?

(Presenting witness with volume.)

Q. Handing you Exhibit Number 21, were you familiar that particular night with Rule 922? [114]

A. Yes.

Q. Will you read that rule to us, please?

A. (Reading): “Firemen are to be—” couldn’t someone else read this, please.

Q. Yes, I would be glad to.

Mr. Gearin: It is all right with me.

Mr. Rerat: If counsel has no objection.

Mr. Gearin: No.

Mr. Rerat (Reading): “Rule 22: Firemen are subordinate to engineers. Engineers must see that firemen are familiar with and perform their duties, instruct them if necessary, and see that they are conversant with and properly understand and comply with the rules and special instructions, particularly those relating to the operation of trains. Disobedience and incompetency must be reported. The engineer or the fireman must not move the train or any part of its machinery unless he knows that it can be done without injury to anyone. The engineer or fireman must not go underneath the engine without notifying the other * * *”

Now, that rule was in force and effect, and you were familiar with that rule; is that correct?

A. Yes.

Q. You were also familiar, were you not, with

(Testimony of Leo B. Moore.)

a bulletin that was issued on February 2, 1955, that related to power tests? [115] A. Yes.

Q. And a power test is what?

A. Well, a power test would be to come to a maximum speed to get the, what you call it, motors in gear.

Q. In other words, when the units are standing still, you would say that unit—the Diesel units are standing still, then the machinery of the units gets up to a speed, a high speed, so that all that is necessary is to just release a gadget, and then the Diesel goes forth with a high speed; is that correct?

A. No, sir.

Q. How does it operate?

A. Well, you start out generally just like you would drive a car, and then you pick up your speed for your motors to kick in.

Q. That movement was prohibited and against the rules of the company; is that correct?

A. Yes.

Q. That would be a movement whereby you would stop on the main-line track going in one direction, and the transition tests would be in the reverse movement; is that correct?

A. Well—yes.

Q. You were familiar with that bulletin, you had been issued a bulletin that was given—that was issued by the company to the firemen and to the engineers on February 2, [116] 1955; is that correct? A. Yes.

Q. Four days before this accident happened. As

(Testimony of Leo B. Moore.)

far as the pilot herder is concerned he has nothing to do with the operation of the engine such as in the operating of any gadget or running the train in any way, does he?

A. No, sir, only on clearance of the engine.

Q. That is right. Now when you were coming back after the engine had been down to Guilds Lake, you started from Guilds Lake in the place in front of the engine where you were supposed to be; that is correct? A. Yes.

Q. By the fireman's side, and traveling south, coming back from Guilds Lake to the terminal, you would be on the left side, or you would be on the east side; is that correct? A. Yes.

Q. And the engineer would be on the other side or would be on the right side; is that correct?

A. Yes.

Q. These two engines, they were back-to-back; is that correct? A. Yes.

Q. So that on the south end, the end that you were traveling, the cab, is that located for the fireman and the engineer sitting, and also on the back end there is also the same thing [117] there on the rear engine, that would be on the north end, a place for the fireman and for the engineer to sit; is that correct? A. Yes.

Q. When you started out from Guilds Lake, there was a stop made by the engineer at 17th Street; is that correct? A. Yes.

Q. What was his name? A. Meyers.

Q. Are you still working with Mr. Meyers?

(Testimony of Leo B. Moore.)

A. No.

Q. He is still with the company at the present time?

A. Yes.

Q. But you have not worked with him for a while?

A. No.

Q. When the Diesels stopped there, did you have anything to do with the stopping of those Diesels?

A. No.

Q. Did you even know they were going to stop at that place?

A. Well, I heard the words then, "We will stop there."

Q. From Mr. Meyers, the engineer?

A. The electrician.

Q. Well, then, when you made the stop then, you were told at that time, were you not, by Mr. Meyers that you were going to make a reverse movement, and all he asked you to [118] do was to go back to the rear of the cab and turn on the headlight, see if it was clear, and give him three bells; is that right?

A. And turn the radio on.

Q. That is all that he told you; is that correct?

A. Yes.

Q. He never gave you—Mr. Reiner was not sitting in the front end of the cab, was he?

A. No.

Q. No. He was sitting, he was in the rear end of the cab; is that correct?

A. That's right, yes.

Q. There was nothing said by Mr. Meyers to

(Testimony of Leo B. Moore.)

you about giving any instructions to Mr. Reiner; is that correct? A. Well, he knew I would.

Q. I just asked you, all that I am asking is whether—— A. No.

Q. ——he gave you any instructions to give to Mr. Reiner? A. No.

Q. No. Now, did he tell you when you left there to give instructions to anybody as to what you were going to do? A. No.

Q. No. When you went back there—strike that—you could have operated that engine in a backward movement by your being on the east side and the engineer being on the right [119] side? There is a place where both of you could sit there; isn't that correct, in the rear of the second Diesel?

A. Yes.

Q. But you did not do that?

A. May I have the question again?

Q. I might say if you do not understand any of my questions, just ask me, and I will try to make that clear. Will you just read——

The Court: I would suggest you rephrase it. You spoke of his operating the Diesel. You said “you” operating. Do you mean by that that the Diesel could be operated by two persons who were supposed to operate it?

Mr. Rerat: Yes, the Diesels could be operated by the persons that were supposed to operate it.

That was you and Mr. Meyers?

The Court: Now don't put that in your question.

(Testimony of Leo B. Moore.)

Mr. Rerat: Well, let me start over again, your Honor.

Q. In the rear unit there was a place for the engineer and for the fireman to sit, or the hostler helper; isn't that correct?

A. Yes, there is room to sit.

Q. Could the Diesel have been operated from some other place the same as from the front end?

A. No.

Q. When you went back there, did you tell anybody how far [120] that you were going to make a backward movement? A. Yes.

Q. Did you tell them the distance that you were going to go?

A. I didn't exactly say the distance. I told them to the 20th Street.

The Court: To whom did you tell that?

The Witness: To the herder and the boiler-maker.

The Court: Who was the herder and who was the boilermaker?

The Witness: Ray Brady, and what is the——

The Court: I cannot hear you. Would the court reporter read the last answer?

(Last answer read.)

The Witness: And Frank Reiner.

Q. (By Mr. Rerat): The track that you came up on was a straight track, was it not, the west-bound main line? A. Yes.

(Testimony of Leo B. Moore.)

Q. Were there any obstructions between the place that you were—where the rear of the second unit was standing, where the switch stand or the switch light was located right on the west side of the westbound main-line track?

A. There was none.

Q. No obstructions at all, and you were familiar, were you not, with that route? [121]

A. Yes.

Q. You had been over that route before. Now, in this stand, this switch stand that is located on the west side of the westbound track, there is a light that shows a green or red depending on the way the switch is lined; is that correct?

A. That is correct.

Q. Yes, and if it looks to—about how far would you say that switch light was from the rear of the second unit that was standing on the westbound main-line track?

A. Three or four units lengths.

Q. About what?

A. Three or four-unit lengths.

Q. That would be how far away, would you say, about? When you say units lengths, what do you mean by a unit length?

A. Well, the length of the unit, in my judgment it was three or four lengths of the unit.

Q. And the unit would be how long?

A. From 40 to 50 feet, something in that order.

Q. About 40 to 50 feet. Then, as I understand

(Testimony of Leo B. Moore.)

your testimony the switch stand was about, would you say, 160 feet or more?

A. Something on that order.

Q. About 160 or other.

You had full control of the handling of the light in back of that Diesel engine; did you not? [122]

A. No.

Q. Your instructions were from Mr. Meyers, were to go to the rear of the cab, turn on the headlights, and see if it was clear, and then give him three bells to come back? A. That's right.

Q. All the instructions he gave you?

A. Yes.

Q. So when you went back there you did consider it your duty to look out to see if everything was clear before the movement went back; is that correct? A. That's right.

Q. You felt, did you not, it would be unsafe to move before you could see whether the movement could be made in safety in a reverse movement?

A. That's right.

Q. Now, when you looked out the switch would be directly north, would it not, as you said, 160 feet or so; something like that?

A. I imagine it was directly in front, but it was a little over that distance, yes.

Q. About what would you say, approximately? Would you say approximately, or would you say more than that?

A. I would say a little more than that would be the distance.

(Testimony of Leo B. Moore.)

Q. About 160 feet or some more, as you said, when you looked [123] out, what did you observe about the switch light as to whether it was green or red for traffic going in a reverse position?

A. It was green.

Q. It was green? A. Yes, it was clear.

Q. From that time when it was green until the time of the collision how much time elapsed, would you say? A. Oh, a very few minutes there.

Q. Would you say minutes or would you say seconds? A. Well, either one.

Q. Let me ask you this. When you looked and saw that the light was green, that meant to you that that switch lighting from the crossover, from the eastbound main to the westbound, that the switch was not lined; was that correct?

A. Well, at the track it was not lined for the other track.

Q. That is what I mean. A. Yes.

Q. When you say you looked and you saw it was green, you felt then that it was safe to proceed in a northerly direction; is that correct?

A. Yes.

Q. Yes, and immediately when you saw that it was green and you felt it was safe, then what did you do? [124]

A. Well, before that I turned the light on bright before moving and saw that the track was clear, and gave the three bells to go back, and then at that time I was told to turn it to dim.

Q. I am just wondering whether this is clear.

(Testimony of Leo B. Moore.)

Did you immediately when you went up to the back window and you looked down at this switch light there, was there any light on the back at all at that time? A. Yes, it was on bright at that time.

Q. It was on bright? A. Yes.

Q. And you say that you had a clear view?

A. Yes.

Q. And it was green at that time?

A. Well, the track was clear at that time.

Q. Then as soon as it was clear, then you gave the buzzer, gave the three buzzes, and the unit started back immediately? A. Yes.

Q. Is that correct? A. Yes.

Q. What ever time that it took to do the things that you said was the amount of time that was involved there? A. Yes.

Q. Mr. Moore, looking at that switch light and seeing the switch light was green and then giving the signals to proceed, [125] do you say that with the light on dim as you were proceeding when—back in a northerly direction after you had given the direction for the signal to go back—then——

The Court: Do you wish to strike the first question you have asked him?

Mr. Rerat: Yes, your Honor.

The Court: It is very confusing.

The Witness: It is.

The Court: I would suggest you put simple questions.

Mr. Rerat: Yes.

Q. When the unit started to go back, from the

(Testimony of Leo B. Moore.)

time it started until the time of the impact in what direction were you looking?

A. Towards the rear.

Q. At that time with the engine, with the light on dim, how far could you see ahead of the train?

A. About here to the end of the building—to the room, I would say.

Q. How far do you want that to be, in about how many feet?

A. I would say that is about 50 feet.

Q. As you were proceeding then after the unit started in the reverse direction, when did you first see an obstruction on the track?

A. Would you repeat that? [126]

The Court: I suggest you rephrase it.

Q. (By Mr. Rerat): When the movement started in a northerly direction, the back-up movement, how far had that movement gone before you saw something on the westbound track, you saw cars on the track?

The Court: You just keep compounding your question. What do you want to ask him, when he started to back up how far it had gone before he saw something on the track?

Mr. Rerat: How far, yes.

The Court: Why don't you stop at that. Is that your question? Can you answer that question?

The Witness: Well, we had got moving and had had time to turn the lights down.

The Court: About how far had you traveled? That is the question.

(Testimony of Leo B. Moore.)

The Witness: Oh, about twice the length of the engine.

The Court: Have you finished your cross-examination?

Mr. Rerat: Just a question, your Honor, that I would like to just check.

The Court: You say Mr. Reiner, the plaintiff here, was sitting in the engineer's seat?

The Witness: Yes.

The Court: Are there two engineers' seats?

The Witness: One engineer's seat.

The Court: Where was this man whom you called the [127] engineer? Where was he sitting?

The Witness: He was in the front unit.

The Court: There are two units; is that it?

The Witness: There is two units.

The Court: There were two units; they were hooked together back-to-back?

The Witness: Back-to-back, yes.

The Court: So in the forward unit there was a seat for the engineer and a seat for the fireman; is that right?

The Witness: Yes, there is three seats in each end.

The Court: And the rear end would be the front of the other unit; is that it?

The Witness: That's right.

The Court: That is, the rear of the two units attached together?

The Witness: Yes.

(Testimony of Leo B. Moore.)

The Court: This plaintiff, Mr. Reiner, was sitting in the engineer's seat?

The Witness: Engineer's seat, yes.

The Court: In the Diesel unit facing to the rear; is that it?

The Witness: Yes.

The Court: You and—who is the other man?

The Witness: Ray Brady.

The Court: You and Brady were in the fireman's seat? [128]

The Witness: Brady was in the fireman's seat, and I was standing in front of the control panel.

The Court: In the unit facing forward?

The Witness: Yes, where I could look out.

Q. (By Mr. Rerat): Well now, when you came back to the cab did Mr. Reiner get up from the seat? A. No.

Q. That is when you came back to the back unit?

A. No, not——

Q. When you were operating—strike that—during the time that you were in the back of the—in the back unit, the time you went—from the time you went back to turn on the headlight up until the time of the collision, where were you standing all the time?

A. I was standing in front of the control panel at the end of the control panel.

Q. That is where—shown on these pictures here; is that correct? A. Yes.

Q. If you had not moved from the front of the cab where you were seated at the time the stop—

(Testimony of Leo B. Moore.)

that the Diesel stopped and were in the cab on the opposite side, where Mr. Meyers, the engineer, was sitting, after the movement had been made in a backward movement, were you sitting up in front instead of being in the back, could you have seen the switch lights from where you were at that time?

A. No.

Mr. Rerat: That is all.

Redirect Examination

By Mr. Gearin:

Q. Could you have seen them if the headlight had been on bright? A. Yes.

Q. Was this a power test? A. No.

Q. Were you hurt in the collision?

A. I was shook up quite a bit.

Q. When you started the backward movement, will you describe, please, what kind of a movement it was as to being smooth or jerky?

A. It was smooth, just on the normal back-up.

Q. Thank you.

The Court: Anything further of this witness?

Mr. Rerat: No further questions.

The Court: You may step down.

(Witness excused.) [130]

RAY C. BRAY

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Bray, what is your occupation?

A. Boilermaker.

Q. By whom are you employed?

A. Northern Pacific Terminal.

Q. Were you in the cab of the rear locomotive with Mr. Reiner? A. Yes, sir.

Q. I mean, the engine thereof, and were you there when Mr. Moore, the hostler helper, came aboard? A. Yes, sir.

Q. Now, as boilermaker, do you have anything to do with the operation of trains? A. No, sir.

Q. Was there any conversation in the cab when Mr. Moore came back and got in?

A. I heard him tell Mr. Reiner that the engineer wanted to move back.

The Court: I cannot hear you, Mr. Bray. You heard him tell Mr. Reiner?

The Witness: That the engineer wanted him to tell [131] the herder he had to make a move back.

Q. (By Mr. Gearin): What, if anything, was done or said with regard to the headlight?

A. The headlight was turned on bright, and Mr. Reiner spoke up and said, "You can't back up with a bright light."

Q. Then what happened?

(Testimony of Ray C. Bray.)

A. The light was turned on dim.

Q. Was there any light in the interior of the cab?

A. Yes, the dim light was on.

Q. Was that dim light ever turned off?

A. Not to my knowledge, no.

Q. Do you know where the buzzer is that we have been talking about?

A. I do.

Q. What is the fact as to whether or not you had ever seen Mr. Reiner operate that buzzer before?

A. Once in awhile he did operate it when he wanted to cross the Interlocken Plant.

Q. When you started the back-up movement, will you tell us what kind of a movement it was as to being rough, smooth, or jerky or how?

A. It was very smooth.

Q. Were you hurt in the accident?

A. No, sir.

Mr. Gearin: I have no further questions. [132]

Cross-Examination

By Mr. Rerat:

Q. Mr. Bray, as I understand it, you had nothing to do with the operation of the engine, is that correct, any of the gadgets?

A. No, sir.

Q. You had nothing to do with the operation of the headlights?

A. No, sir.

Q. You had nothing to do with the operation of the windshield wiper?

A. No, sir.

Q. You had nothing to do with any of the gadgets on the engine?

A. No, sir.

(Testimony of Ray C. Bray.)

Q. You knew that the engine was being operated by the fireman and the engineer, the hostler and the hostler helper; is that correct?

A. That's right.

Mr. Rerat: That's all.

Mr. Gearin: I have no further questions.

The Court: You may step down.

(Witness excused.) [133]

GEORGE CHARLES RUSELLI

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Ruselli, where do you live?

A. Portland, Oregon.

Q. What is your occupation?

A. I am a photographer and investigator.

Q. Do you recognize Mr. Reiner, the gentleman sitting here? A. Yes, sir, I do.

Q. Do you recognize the lady with him?

A. Yes, sir.

Q. Who is she? A. Mrs. Reiner.

Q. Have you had occasion to see them before today? A. Yes, sir.

Q. At whose request did you see them?

A. At your request, sir.

Q. You say you are a photographer. Did you take photographs of Mr. Reiner?

(Testimony of George Charles Ruselli.)

A. Yes, sir, I have.

Q. What kind of photographs did you take?

A. Motion pictures. [134]

Q. When did you take these motion pictures?

A. On December 8th of 1956, and December 22, 1956; January 4, 1957.

Q. What type of camera did you use?

A. Bell and Howell, 16 millimeter, magazine loaded.

Q. What type of film?

A. Plus X, 16 millimeter film.

Q. Where were those photographs taken?

A. In the vicinity of Mr. Reiner.

Q. Do you have the equipment with you for projecting the motion pictures that you took?

A. Yes, sir, I have.

Q. Are they in the courtroom?

A. They are.

Q. I wonder if the Court will hand the witness a sealed exhibit and he should open it, please.

The Court: Is it marked?

Mr. Gearin: Yes, it is, your Honor

The Court: What number is it marked?

The Clerk: Twenty-eight.

The Court: Exhibit 28. You may unseal it and hand it to the witness.

(Exhibit handed to the witness.)

Q. (By Mr. Gearin): Calling your attention to the box that is inside a folded-up newspaper, what is that, Mr. Ruselli? [135]

(Testimony of George Charles Ruselli.)

A. This carton contains the motion pictures I took of Mr. Reiner.

Q. Are you able by means of the films that you have there and the projection equipment that you have in the courtroom to accurately and correctly portray on the motion-picture screen Mr. Reiner as he appeared to you at the time you took the photographs? A. Yes, sir.

Q. Are these the only photographs you have taken, the only film that you have exposed with reference to Mr. Reiner? A. Yes, sir.

Mr. Gearin: We offer those in evidence, your Honor.

Mr. Rerat: Your Honor, first of all, we would like to have an opportunity to see the films. There might not be any objection to them, but I would request time that I be allowed to see them before they are marked.

The Court: You are requesting that they not be exhibited before they are received in evidence?

Mr. Rerat: That is not in the presence of the jury until I have had a chance to see them. I have never seen them.

The Court: What is your objection?

Mr. Rerat: Your Honor, I object to them on the ground that I have not had an opportunity to see them and that they [136] would be incompetent and immaterial at this time. The request that I make, your Honor, is for permission to just see them first so I have an opportunity——

(Testimony of George Charles Ruselli.)

The Court: In other words, you wish a private exhibition of them?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: I have no objection, your Honor, as long as the Court is present.

The Court: How long will it take?

The Witness: Approximately 15 minutes, sir.

The Court: Fifteen minutes to run them?

The Witness: Yes, sir.

The Court: Can't we proceed with something else, and you gentlemen can see them——

Mr. Gearin: I have no other testimony, your Honor, with the exception of one or two exhibits which I can offer into evidence now, and then Dr. Carlson is coming at 2:00 o'clock, and I will rest my case.

The Court: Very well. Do you have any questions to ask this witness on cross-examination.

Mr. Rerat: No, your Honor, no.

The Court: Then except for the doctor you can rest?

Mr. Gearin: Yes, sir.

The Court: If these films are admitted?

Mr. Gearin: Yes, sir. [137]

The Court: Ladies and Gentlemen of the Jury, we will excuse you for 15 minutes, subject to the usual admonition.

(Thereupon, at 11:20 a.m., the jury retired from the courtroom.)

The Court: Will you set up your equipment right away and run them as quickly as possible?

(Testimony of George Charles Ruselli.)

(Thereupon, the witness set up motion picture equipment in the courtroom.)

The Court: Mr. Reiner, you and Mrs. Reiner may come forward and view them if you like and any other persons present in the courtroom if they wish to see them.

Are you ready, Mr. Rerat?

Mr. Rerat: Yes, your Honor, I was just wondering this, when he runs them, if he would run them in different portions, that if the witness would just state on the date that each one was run as you cover several dates.

The Witness: Yes, sir.

The Court: You introduce each one by saying, "These were run," and giving the date.

The Witness: Yes, sir. As far as the films we will show, they are taken on December 8, 1956.

(Moving pictures projected on screen.)

The Court: Is this a new thing?

The Witness: No, sir, that is the end of the 50-foot roll of film. [138]

Mr. Rerat: You have not started the second one, have you?

The Witness: This is still the same one.

These films were taken on December 22, 1956. Still the same date.

(Projection of pictures continued.)

The Witness: These were taken on January 4, 1957.

(Testimony of George Charles Ruselli.)

That is the total film I have of Mr. Reiner.

Mr. Johnson: That first picture, was that December 8, 1956?

The Witness: Yes, sir.

Mr. Rerat: He said '56. I wonder if he didn't mean '55.

The Witness: No, December, 1956.

The Court: Do you want the jury summoned, gentlemen? Leave that in the proper position that the jury can see it. Is there any objection to it?

Mr. Rerat: I would object to them on the grounds they are incompetent, immaterial, and that the pictures would be offered, I take it, for the purpose of impeachment, and there is nothing in these pictures that go to the impeachment of any of the testimony here by the plaintiff.

Mr. Gearin: And my position on that, your Honor, while it is not in the record, it has been obvious since yesterday that Mr. Reiner has been walking in a very guarded manner [139] throughout the entire trial with appearance of difficulty, pain, and discomfort and inability to move freely. The photographs which you have seen speak for themselves and impeach the actions of the plaintiff.

The Court: The objection will be overruled. You may state your objection in the presence of the jury, if you wish, and the Court will make a ruling.

(Discussion off the record.)

Mr. Rerat: Well, your Honor, we won't have any objection; whatever they are worth, very well.

(Testimony of George Charles Ruselli.)

The Court: Very well.

(Thereupon, the jury was summoned and returned to the jury box at 11:40 a.m.)

The Court: Is it stipulated, gentlemen, that the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes.

(George Charles Ruselli was recalled and resumed the stand.)

Q. (By Mr. Gearin): May I ask one question? Mr. Ruselli, what experience have you had in photography?

A. I was photographer with the Marine Corps.

Q. During the war?

A. Twice, during World War II and Korea.

Mr. Gearin: We offer the photographs in evidence and [140] ask that the witness be permitted to exhibit them to the jury.

Mr. Rerat: No objection, your Honor. I would like to ask now a couple of questions, but I will wait until the pictures are shown.

The Court: Suppose you ask them now if you have them in mind.

Mr. Rerat: Yes, I do, your Honor.

Cross-Examination

By Mr. Rerat:

Q. These pictures that were taken, they were arranged for by counsel for defendant?

A. Mr. Gearin, yes, sir.

(Testimony of George Charles Ruselli.)

Q. Did you go out yourself and take the pictures, or were you accompanied by someone?

A. I was by myself.

Q. You are being paid by Mr. Gearin for the time and services that you have rendered?

A. No, sir.

Q. Who are you being paid by?

A. Krout and Schneider.

The Court: Exhibit 28, the film will be received in evidence, and the witness will now exhibit the film to the jury.

(Motion picture films, heretofore marked Defendant's [141] Exhibit 28 for identification, were received in evidence.)

(Thereupon, the motion picture films above designated were projected on the screen in the presence of the jury.)

The Court: Can all members of the jury see? I take it, hearing nothing, you can all see. This picture now being shown was taken when, Mr. Ruselli?

The Witness: December 8, 1956.

The Court: 1956?

The Witness: Yes, sir.

The Court: December 8th?

The Witness: Yes, sir.

The Court: This film was taken when?

The Witness: This is also December 8, 1956.

The Court: Suppose you tell us when there is any change in date.

The Witness: Yes, sir, I shall. We are still on

(Testimony of George Charles Ruselli.)

December 8th. This is the end of the December 8th film. The next will be on December 22, 1956. These were also taken on December 22nd.

The next film was taken on January 4, 1957.

The Court: Does that complete the showing of Exhibit 28?

The Witness: Yes, sir. [142]

The Court: Are there any other questions of this witness?

Mr. Gearin: No, sir.

Mr. Rerat: Just one question. Did you at any time take out anything out of the hood of the automobile? A. No, sir.

Q. Or have it requested that it be taken out?

A. No, sir, I did not.

Mr. Rerat: That is all.

The Court: You may step down.

The Witness: Thank you.

(Witness excused.)

The Court: Your only other witness, as I understand, is the doctor?

Mr. Gearin: Yes, sir. I would like, however, at this time to offer in evidence the original Complaint in this case and also a Complaint in the action entitled *Frank Reiner vs. Northern Pacific Terminal Company of Oregon*, Civil Number 8538. The Clerk has the latter file on his desk.

The Court. The Complaint in this case is received in evidence and removed from the file, Mr.

Clerk, received in evidence as Exhibit—what is the number?

The Clerk: 30.

The Court: Exhibit 30.

(Original Complaint in this action, was [143] thereupon marked Defendant's Exhibit 30 for identification and received in evidence.)

The Court: Is there any objection to the Complaint in Civil 8538?

Mr. Rerat: No, I have no objection.

The Court: Received in evidence, Exhibit 31.

(Complaint in Civil Number 8538 was thereupon marked Defendant's Exhibit 31 for identification and received in evidence.)

Mr. Gearin: That is all I have, your Honor, until the doctor gets here at 2:00 o'clock.

The Court: The doctor will not be here until 2:00?

Mr. Gearin: I've tried to get him, but I am unable to, your Honor.

The Court: Very well, we will take a recess until 2:00 o'clock this afternoon. Before we separate, Ladies and Gentlemen of the Jury, I again must admonish you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of the trial. You are not to form or express an opinion on the case until after it has finally been submitted to you for your verdict. You are now excused until 2:00 o'clock this afternoon.

(Jury retires for the noon recess.) [144]

(2:00 p.m., trial resumed.)

The Court: Stipulated, gentlemen, the jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Proceed.

Mr. Gearin: We will call Dr. Carlson.

C. ELMER CARLSON

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Dr. Carlson, what is your occupation or calling?

A. I am a physician and surgeon specializing in orthopedic surgery which is bone and joint surgery.

Q. Dr. Carlson, when were you admitted to practice your profession? A. 1920.

Q. Of what schools are you a graduate?

A. University of Oregon Medical School, Reed College.

Q. Are you duly licensed to practice your profession in the City of Portland? A. Yes.

Q. You are on the staff of what hospital?

A. Good Samaritan Hospital, Emanuel Hospital, and Doernbecher Hospital. [105]

Q. How long have you been practicing your profession, I mean your specialty?

(Testimony of C. Elmer Carlson.)

A. Specialty since 1924.

Q. Did you receive special training for that?

A. I did.

Q. Doctor, did you have occasion to treat Mr. Frank Reiner, the plaintiff in this case?

A. Yes.

Q. In connection with an orthopedic problem?

A. That's right.

Q. When did you first see him?

A. May I have my notes?

Mr. Gearin: The notes are there, Mr. Clerk.
Will you hand them to the Doctor, please?

The Court: What exhibit is that?

Mr. Gearin: 32, your Honor, for identification.

The Witness: Your question is when did I first see him? I saw him on January 19, 1953.

Q. (By Mr. Gearin): Did you see him for treatment?
A. Yes, sir.

Q. Was he referred to you.

A. Yes, he was.

Q. By whom was he referred?

A. Dr. J. E. Hughes.

Q. Did you obtain any history of complaints at that time? [106]
A. Yes, I did.

Q. Will you tell us what history you obtained from the plaintiff in 1953?

A. Well, I might just read my first few lines, if that is all right.

Q. If you want to, you go right ahead, Doctor.

A. The patient states that years ago when working at the New Montgomery Building he was lifting

(Testimony of C. Elmer Carlson.)

a frog and injured his back. He said this steel weighed about 75 pounds. He said he is not sure if the present complaints are as a result of this early back injury; states in August, 1952, while in bed his back began to pain. At that time Dr. Mundal saw him, gave him some pills, prescribed a corset which he was wearing at the time that I saw him. He complained of his left knee at that time.

Q. Referring to his back, did you cause any X-rays to be taken? A. Yes, I did.

Q. What did they show, if anything, with reference to the low back?

A. Well, he had some arthritis, and also the last joint, which we call the fifth joint is thinned and narrowed.

Q. What was thinned or narrowed?

A. This joint space.

Q. What is between the joint space of the fifth lumbar [107] vertebra and the sacrum? What do they call it?

A. Well, that little cushion, we refer to them as discs, they are made out of cartilaginous material, and they act as cushions.

Q. What was the significance of narrowing of the intervertebral spaces, Doctor?

A. Well, that changes the relationship of the joint there and is apt to cause pain.

Q. Did he complain of pain at that time.

A. Yes, he did.

Q. Will you continue, if you will, Doctor—strike

(Testimony of C. Elmer Carlson.)

that. I am ahead of myself. Did you continue seeing him after that?

A. Yes, I saw him in May, 1953, when he was then referred by Dr. Mundal, and his complaints were similar at that time, and I took some X-rays at that time, and they showed the same thing.

Q. Will you continue then with the—what complaints he had and what you did for him and what his condition was from 1953 up until the present time or the last time you saw him.

A. Well, I saw him again on February 17, 1955, and at that time he gave a history. On February 6, 1955, that was eleven days before I saw him after he had jumped from a cab of an engine to the ground, and that he at that time [108] was thought to have had an injured leg. When he came into my office—he was taken to the hospital at that time and had some X-rays taken of the knee. Then when he came into my office, he was on crutches. This time he complained of pain in his lower back and on the left side of his leg just below the knee. The examination of his back at that time revealed some irritability at the last joint, the lumbo-sacral joint, this being on the left side, and the knee joint was all right.

Q. When you saw him in 1953, at any time was the plaintiff wearing a back brace or support?

A. Yes, the first time that I saw him he was wearing a corset.

Q. You had not prescribed that for him?

A. No, I hadn't.

(Testimony of C. Elmer Carlson.)

Q. How many times after that that you saw him did he continue to wear this corset?

A. Well, he was wearing it when I saw him on May 26, 1953.

Q. For what purpose, Doctor, do you ordinarily prescribe a back brace or a corset?

A. For protection of some painful joint.

Q. Is the joint that you have described in the low back between L-5 and the sacrum such a joint as would produce pain requiring a belt?

A. Yes, sir. [109]

Q. Will you continue, please, Doctor?

A. Well at this time on February 17, 1955, I made the diagnosis of sprain of this same joint, and there was nothing additional specific ordered for him at that time. I saw him again the next month at which time he was having—he had had some sort of an attack, he told me. I don't know just exactly what it was, but he was sent to Good Samaritan Hospital by his doctor at that time, and he remained there for four days. He told me at that time he coughed up some blood, and at this time he had some pain in his low back and also in his knee.

On March 31, 1955, I saw him again. This time he was still wearing a belt. He had some irritability of the lumbo-sacral joint at that time. He was then complaining of some pain in his—Some sciatic pain which had been present as early as January, 1953, and I thought he ought to have some rest for this reason, and sent him to the hospital, and treatment known as traction was applied. They put weights

(Testimony of C. Elmer Carlson.)

on the leg so as to relieve strain on the lower back. He went in the hospital on March 31st and was discharged on April 13th much improved.

When I saw him in May, 1955, he was wearing a different corset at this time, and he thought that the pain then was really all gone, as he commented to me at that time, but he was still concerned about his knee. [110]

I saw him—let's see, it was in May. I saw him again in August, and at this time he was again sent over by Dr. Mundal who thought he might have what is called a disc. That is the same thing we are talking about, a protrusion of this disc. Dr. Mundal thought he might need a fusion operation.

Q. Doctor, what disc are you referring to?

A. Between the fifth lumbar and the first sacral. That is the lumbo-sacral.

Q. Is that the first one that you first observed?

A. Same one. I am referring to the same one all the time.

Q. Thank you, Doctor.

A. He had gained a lot of weight. He was at that time wearing a corset, and that was in August. Then in September I saw him again, and I thought that since he was still having definite pain in this region it would be best to what we call stabilize the joint, to then remove what little motion that there is by doing what is known as a fusion operation which is the same as a bone graft in which an operation is done wherein the last vertebra and the sacrum are grafted together so that there is no

(Testimony of C. Elmer Carlson.)

motion in this joint. There was very little motion anyhow because the disc had been thinned out but apparently that continued to cause him some trouble so on October 4, 1955, this operation was performed. [111]

He then wore a cast for a period of time until January 6, 1956, and I saw him on a few occasions since then in the office, the last time being on April 3, 1956.

Q. Is that the last time that you saw him?

A. That's right.

Q. Now, Doctor, going back to 1953 with the narrow interspace between the last lumbar vertebra and the sacrum, assuming a man with that condition was doing heavy work, what would your prognosis be at that time with reference to his future ability to get along and do heavy work?

A. Well, when that joint, which is the one that is most commonly affected in all individuals, because that is where most of the strain of the back comes, and with the thinning of that cushion and wearing down of that cushion, why, that is the type of back that would then be subject to strain and disability.

Q. Doctor, you have mentioned the weight of the plaintiff. What effect, if any, does obesity have with reference to an unstable low back?

A. Well, it puts more strain on the ligaments and on the joints, and arthritic changes of the joints are much more common in overweight people than they are underweight people or normal.

(Testimony of C. Elmer Carlson.)

Q. Did you notice a condition of arthritis in the patient's low back? [112] A. Yes.

Q. When did you first notice it?

A. Well, that was noticed in the first X-rays that I took in January, 1953.

Q. How does that manifest itself in the low back with reference to pain or disability?

A. Well, it varies a great deal in different individuals. It usually indicates roughness of the joint, and, therefore, the joints do not stand as much strain as they would otherwise.

Q. Following the fusion, Doctor, did you continue to check the progress of Mr. Reiner?

A. Yes.

Q. Did you take X-rays after the fusion?

A. Yes, my last X-rays were taken on March 16, 1956, or—yes, '56.

Q. At that time, what, if anything, did the X-rays portray?

A. The X-rays indicated to me a solid fusion.

Q. Now, Doctor, does that mean bony union?

A. Yes.

Q. Doctor, would you take the X-rays there that the Clerk is going to hand you and pick out the X-rays that you took the first time that you saw this man, and we will have them in the view box. I would like to ask you a preliminary question. These X-rays that are being handed you, Doctor, [113] were taken under your supervision?

A. Yes, sir.

Q. And at your direction? A. Yes, sir.

(Testimony of C. Elmer Carlson.)

Mr. Gearin: We will offer them in evidence.

The Court: They are numbered?

Mr. Rerat: What are the numbers, your Honor?

The Clerk: 33-A through -K.

The Court: Is there any objection?

Mr. Rerat: No objection.

The Court: Received in evidence.

(Thereupon, X-rays previously marked Defendant's Exhibits 33-A through -K, inclusive, for identification, were received in evidence.)

The Witness: Are these in the same order that they were in the envelope?

Mr. Gearin: I tried to get them that way, Doctor.

The Witness: These pictures are always taken in threes, but the one that is really the most significant is the smaller picture and the side view. X-rays are shadow pictures. They are shadows of bones, and from a side view the vertebrae appear rectangular. The vertebrae appear rectangular. They are rectangular shadows. When we come up here to this level, we see a little roughening up here [114] (indicating), and that is what we call arthritis. We are particularly interested in this lower joint. In order to get a direct view of that we take another picture and see the whole spaces here. This space is wide; this space is wide; and this space is very narrow.

Q. Now, the last photograph that you have there, Doctor, bears what number, please, in the view box? A. This?

(Testimony of C. Elmer Carlson.)

Q. Yes, sir. A. 33-A.

Q. Doctor, would you take one of the photographs which you took, X-ray photographs, after the fusion, say, the last photograph that you took?

A. These are not in the same order that they were. This is 1955. Were there any more in that envelope? This is one right here.

The Court: That is Exhibit—

The Witness: Just a second here, there should be a small one to fit that. Is there another small one in that envelope? No, those are not the ones.

Q. (By Mr. Gearin): Now that number, please, Doctor, is what? A. 33-J.

Q. What does the X-ray picture portray?

A. Well, this shows the same joint that I showed just a [115] minute ago. This is still narrowed here, and now you can see a mass of bone in the back here. The way this fusion is done is to—we don't operate right in the, into the joints. The operation is done in the back and the back portion of the vertebrae, what we call the spinous process and the lamina, the structures in the back. They are fused. A bed is prepared, and then bone is removed from another part of the body over here on the crest of the hip bone, and that is used as fusion material. It is packed in there, and finally that grows together. See, there, right there between this bone and this bone, this piece. This is still narrow. You do not touch that part. There is no need to. (Indicating on X-ray.)

Q. Doctor, from your treatment and examina-

(Testimony of C. Elmer Carlson.)

tion, did you have an opinion after the fusion whether or not the man could return to work?

A. The last time that I saw him——

The Court: The question is did you have an opinion, Doctor?

The Witness: Yes, sir.

Q. (By Mr. Gearin): What was your opinion?

A. Well, I thought that he could return to work, and I thought that he was grossly overweight, with the complaint of these knees and so on so I thought he should go back and see his medical doctor and have an examination and see if [116] there was anything he could do for him. That is the last that I saw of him.

Q. With specific reference to the back.

A. I thought he would be able to return to work the last time I saw him, in answer to that question.

Q. At the time of your last examination, Doctor, what was his condition with regard to an unstable low back compared with, say, the last time you saw him before this accident of February of 1955?

A. Well, he had had the benefit of a fusion operation to stabilize that joint, which he had not had before.

Q. Did that improve the situation, make it stable, or what is the effect of a fusion operation?

A. That is the effect of it, to make it stable.

Q. What is the effect of such stability with reference to any pain or disability which exists by reason of prior instability?

A. So far as that particular joint is concerned,

(Testimony of C. Elmer Carlson.)

it stabilizes the joint and should remove the pain there.

Q. Now, was there any movement at the fusion site at any time that you examined this man?

A. No.

Q. I was wondering if the Clerk would hand to Dr. Carlson X-rays that were taken at the direction of Dr. Montgomery. Have you seen those X-rays here during the noon hour, Doctor? [117]

A. Yes, sir.

The Court: They will be Exhibit 12-A, -B, and so forth, Mr. Clerk.

(Group of X-rays marked Defendant's Exhibits 12-A, -B, -C, -D, -E, and -F.)

Q. (By Mr. Gearin): Doctor, what do they call it when they bend forward?

A. That is called flexion.

Q. What is it when they bend backwards?

A. That is called extension.

Q. By taking an X-ray picture of flexion and extension at the site of a fusion, can you determine by the X-ray pictures superimposed, one upon the other, whether or not there is any motion joint site, in the fusion situs?

A. Yes, you can. That is the reason that the pictures are taken, and, of course, if they superimpose perfectly we then feel that there is no motion there.

Q. Take the pictures of flexion and extension taken by Dr. Montgomery, superimpose one upon

(Testimony of C. Elmer Carlson.)

the other in front of the view box, and tell us what, if anything, you find with respect to any mobility in the joint. Will you call the number out, please, Doctor, as you use these?

A. 12-C, these are similar projections to which we just were looking at in the other pictures. This is marked "flexion." It was taken when the patient was bent this way. [118] This one is marked "extension," which was taken when the back was this way (indicating). Now, the operation involves only one joint, just the last joint, the lumbo-sacral joint, this one right here, and if we start in with that——

The Court: Now you are in the act of superimposing one exhibit on top of another. Tell us which exhibit is which now.

The Witness: I am superimposing 12-B and 12-C. Now those are superimposed, I believe, as accurately as it is possible for them to be. This is the shadow of the sacrum. This is the shadow of the fifth lumbar, and I am unable to tell that there is any difference, that is, there is no overlapping of shadows. When you go up above here, there is overlapping of shadows where the joints are normal and where there would naturally be some motion.

Q. (By Mr. Gearin): Did you fuse other joints other than L-5 and -6? A. Just the one.

Q. Then, Doctor, if you will resume the stand. Doctor, the fusion which you performed was necessitated by what? What caused you to perform the fusion operation?

(Testimony of C. Elmer Carlson.)

A. Painful, what we call a lumbo-sacral joint. It is the last joint.

Q. Is that a condition that you treated him for in 1953?

A. I examined him in 1953. I didn't operate until 1955. [119]

Q. But the condition that you found in 1953 was the painful joint?

A. He had a painful joint then, too, yes.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Rerat:

Q. Doctor, as I understand it, you were working along with Dr. Mundal on this matter; is that correct? A. That's right.

Q. Who is Dr. Mundal?

A. Dr. Mundal is a company doctor with the Northern Pacific Company.

Q. Northern Pacific Terminal; is that correct?

A. Company doctor.

Q. Company doctor.

A. Yes, he does work for the Northern Pacific. He does not limit his work to that, of course.

Q. When you saw him in 1955 did you know at that time that he was released by the doctor and that he went back to work, had no more trouble from that time up until the time of the accident on February 6, 1955?

A. Well, I have no record of his work records.

(Testimony of C. Elmer Carlson.)

Q. Yes. Doctor, in 1955 then you saw him again; is that correct? A. That's right. [120]

Q. In February, I think you said the 17th of February? A. 17th of February.

Q. Doctor, could I see your notes that you have been referring to, please? A. Yes, sir.

Q. I have never seen them.

The Court: Those are Exhibit 32 for identification.

Mr. Rerat: Yes; thank you.

Q. Doctor, I want to ask you a few more questions about February 17, 1955. Would you rather have your notes when I am asking these questions?

A. All right.

Q. All right, I may want them again. Doctor, on February 17th of 1955 you had a history of this man being involved in an accident on February 6, 1955; is that correct? A. Yes, sir.

Q. Doctor, you made an examination of him at that time to determine what injuries that he was suffering from; is that correct?

A. That's right.

Q. You found at that time that he was suffering from an injury to the left leg?

A. That's right.

Q. Doctor, what was the condition of the left leg at that time when you saw him? [121]

A. Well, he told me that he had had a lot of swelling there, and when I had saw him he had been on crutches for two days. You see, I didn't see him until eleven days after the accident happened.

(Testimony of C. Elmer Carlson.)

Q. Yes, that's right.

A. And he was bearing part of his weight on his left leg. His knee-joint motion was good. There was some tenderness on the outer aspect of the leg below the knee, and he complained of a little pain under the arch of the left foot. Now, that is in relation to the leg, that is what you are asking about now?

Q. Yes, and in your opinion, Doctor, were the injuries that he suffered in this accident that you saw at the time of your examination on February 17, 1955, were they all to the soft parts and the muscles and ligaments?

A. Well, the X-rays show not any indication of any breaks or dislocations.

Q. So the injuries then would be to the soft parts? A. That's right.

Q. Now Doctor, you also found, did you not, that at that time he was suffering from a strain of the sacral joint; did you not?

A. I have a note here that when I examined, I examined his back as well as his leg, and he was complaining of a little irritability at this lumbo-sacral level which was the joint [122] that we have been talking about.

Q. Doctor, what was your diagnosis at that time as to what injuries he was suffering from as far as his back was concerned?

A. He had had a sprain of this joint, and he had had contusion of the leg below the knee.

Q. Doctor, you felt at that time that as a result

(Testimony of C. Elmer Carlson.)

of this accident that he had a sprain of the lumbo-sacral joint; is that correct?

A. That's right.

Q. Yes, and that was indicated, Doctor, by what on your physical examination?

A. Well, I have no definite notes except that we put them through certain motions, and I have a note here that my orthopedic examination reveals a little irritability at the lumbo-sacral level.

Q. Then, Doctor, did you find any other injuries that he was suffering from at that time besides the sprain of the lumbo-sacral region, the left leg injury?

A. And he had a sprain of the ligaments of the foot.

Q. That was the right or the left foot?

A. Left.

Q. Left foot. Doctor, when you speak of a sprain of the lumbo-sacral region you speak also, do you not, of the injury to the muscles and ligaments surrounding those various bones [123] at that particular region?

A. Principally the ligaments. That is what a sprain is.

Q. That was eleven days after the accident that you saw him, I thought you said?

A. That's right.

Q. Then, Doctor, you saw him again when?

A. The next time was on March 31st.

Q. Doctor, after determining that he was suffering from a lumbo-sacral sprain of the lower part

(Testimony of C. Elmer Carlson.)

of the back, what treatment did you prescribe at that time?

A. Well, he was complaining more of his knee at that time. There was no specific treatment for his back at that time.

Q. Then you saw him again, Doctor, in March?

A. That's right.

Q. Yes, and where did you see him in March?

A. Where did I see him?

Q. At your office or at the hospital?

A. At the office.

Q. At the office, and at that time did you examine him to determine how the sprain of the lumbo-sacral region was progressing?

A. I did.

Q. What did you find was the prognosis at that time?

A. Well, at that time he was continuing to wear a belt, and he had some, he had irritability at this same joint on [124] putting him through the usual tests, and I thought at that time because he was having some little pain in the back of his leg that it would be better to put him at rest and put weights on him, put traction on him, which was done.

Q. Doctor, you advised with Dr. Mundal, did you not, that he be sent to the Good Samaritan Hospital?

A. That's right.

Q. He was there from March 31st until some time in April?

A. April 13th.

Q. During that time was he under your care and Dr. Mundal's care?

A. Yes.

(Testimony of C. Elmer Carlson.)

Q. Doctor, while he was there his treatment was what you medical men refer to as traction?

A. That's right.

Q. And they are apparatuses put over the legs and weights that come down over the legs so as to try to stretch the muscles; is that the purpose of putting traction on?

A. The purpose of putting traction on is to separate the joints a little bit, pull them apart a little bit, and in 1953 when he was——

Q. 1955?

A. 1955. At any rate, when this was done we were using traction in which the apparatus is put on the legs, straps are put along both sides of both legs, and then the pulley [125] is attached to the bottom of that with a weight so that there is a continuous pull on the legs. We do not use that method so much any more. There is another method that works a little better in which we put a girdle around the pelvis and pull directly on the girdle. It does the same thing, but it is a little easier on the patient because they do not have to have their legs tied up.

Q. But it was that method?

A. Yes, it is the method, it is the traction method no matter how you do it.

Q. Doctor, after he was discharged from the hospital did he remain still under Dr. Mundal's care, as far as you know? A. He did.

Q. Then you had occasion to see him when?

A. Well, I saw him in May of 1955 again.

Q. Then you saw him in October of '55?

(Testimony of C. Elmer Carlson.)

A. Yes, he was wearing a better corset and said the pain was really all gone. Those were his notes as far as his back was concerned. He was principally concerned about his knee, and so I injected the knee again with hydrocoritan and that again gave him relief.

Q. Then you saw him again several months later; did you not?

A. Yes, I saw him in August; yes, sir.

Q. At that time you advised him to go to the hospital for a fusion operation? [126]

A. Well, not right then. I saw him a time or two after that, and then later I advised him to go to the hospital for a fusion operation.

Q. Could I see your notes just at that point?

(Document handed to counsel.)

Q. Do you want to refer to your notes again, Doctor? I just want to ask you about the operation.

(Document presented to the witness.)

Q. Who performed this fusion operation, Doctor, besides yourself—Dr. Mundal? A. No.

Q. It was just you?

A. I performed the operation. I have an associate who works with me.

Q. He works with you all the time; does he not?

Mr. Gearin: That is just a nodding answer. I think the Court wants to hear the answer.

Q. (By Mr. Rerat): Let me ask you this, Doctor. Did Dr. Mundal work with you?

(Testimony of C. Elmer Carlson.)

A. No, sir.

Q. Was he with you when the operation was performed in this case?

A. I don't believe that he was. Dr. Mundal does not do surgery.

Q. I see. After you had completed the fusion operation, [127] then you put this solid plaster of Paris cast on his back; is that correct?

A. That's right, put it around his body.

Q. Well, that extended from right about the armpits down to the hips? A. Yes, sir.

Q. He was in the body cast for how long a period of time?

A. Well, the cast—we don't put a cast on immediately. We have to wait until the incisions heal. There are two incisions that heal in about two weeks. The cast was applied on October 21st, and he wore this cast until January 6, 1956.

Q. Then you took it off that time?

A. Yes.

Q. Doctor, you have not made an examination of him or have been requested to since then?

A. I did not understand the question.

Q. I say, have you been requested to make an examination of the plaintiff since, I believe, since April of 1956?

A. No, I have not been asked.

Q. It is the last time you made an examination?

A. That's the last time I have seen him.

Q. To treat him; is that correct?

A. That is correct.

Mr. Rerat: That is all.

Mr. Gearin: Thank you, Doctor.

Mr. Rerat: Thank you, Doctor. [128]

The Court: Please step down.

(Witness excused.)

The Court: Your next witness?

Mr. Gearin: Defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Rerat: May we just have a minute. I will call Mr. Reiner for just a question.

FRANK REINER

plaintiff, recalled for rebuttal testimony, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. Mr. Reiner, you were in court and saw some motion pictures which were taken by the defendant of you this morning? A. Yes, sir.

Q. In one of the pictures it showed that the hood of your car was up? A. Yes, sir.

Q. Will you tell us what caused the hood of your car to be up?

A. I went shopping to Fred Meyers on 39th Street, and there is a building that is—you drive right in the building, leave your car and then you go in, do your shopping. When I come out of there, I was in there approximately 15 minutes, I guess, anyway, and proceeded to get in my car, and it [146] started jerking. I didn't know what was

(Testimony of Frank Reiner.)

the matter. It was practically a new car, and I never had any trouble with it. I knew there was something wrong, and I couldn't figure out what it was. It's an eight cylinder Ford Ranch Wagon. So anyway it was bad weather. Being I am not too good on getting around outside like that, and so I had kept it and I had drove at the Safeway which has a store on 39th and Powell and so I drove up just an instant, and I stopped. I knew there was something wrong with the car because it was just jumping and jerking all the time, and so I opened up the hood on my car, which if you just press it down there, a five-year-old child, the hood just gave right there. Then you can get hold of it, and there is springs there, goes up. Meanwhile, there was a couple guys come out of the store, and I didn't know what was the matter, but I left my motor run, and you could see that one of the wires—these are a kind of wires that is riveted on, they are hard to come off. They won't come off by themselves. One of these wires was laying against the motor, and you could see the spark flying there on that.

So there was a man come out, which you seen in the picture, and he had a bundle in his arm. He come up, he says, "What is the matter?" He says, "Oh, I see your trouble right there." He says, "You have got a short. Your wire is off of there." So I stepped around to that [147] side and saw another one off on the other side and more in a complicated place so I told the man, I says, I can't—I shut the motor off. I can't get in there to put that back on there. You have to stoop to get down in there. That

(Testimony of Frank Reiner.)

is what they figured on probably getting, a pretty good picture, but I didn't do it. The man that was there, he put the wire on there, and he also put the other wire on there.

Mr. Rerat: That is all.

Mr. Gearin: I have no questions.

The Court: You may step down.

(Witness excused.)

Mr. Rerat: Your Honor, the plaintiff would like to offer in evidence the amendment to the original Complaint that was filed.

The Court: The amendment will be—comprising part of Exhibit 30 heretofore received in evidence as part of the Complaint.

Mr. Gearin: Yes, your Honor.

The Court: The supplement to the Complaint. Mr. Clerk, will you have it so marked? The supplement will be Exhibit 30-A in evidence.

(Document above referred to was thereupon marked Plaintiff's Exhibit 30-A for identification and received in evidence.) [148]

Mr. Rerat: Plaintiff rests, your Honor.

Mr. Gearin: No further rebuttal. [149]

CLOSING ARGUMENT

Mr. Gearin: I can understand why they brought Mr. Rerat back here from Minneapolis because he certainly makes a beautiful argument to you people. I am going to talk very briefly without the aid of

anything but asking you to recall what the evidence is in this case.

I am going to talk first about liability and about the participation of Mr. Reiner in this accident. Counsel says that he did not know what was going on; he didn't know what they were going to do. Well, is that true?

The plaintiff, Mr. Reiner, said that he knew they were going to go back. He admits so stating at the time of the hearing to which his attention was directed. Mr. Moore told him so, and Mr. Bray says he recalls it.

Now, you may want to believe counsel that those who work for the railroad tell the truth and those who do not do not or vice versa, but the plaintiff himself admitted stating shortly after the accident that he knew that they were going to back up.

Contributory negligence is what I am talking about when I talk about the participation of Mr. Reiner in this movement. By contributory negligence, that means what did he do that was wrong. I am going to tell you what, in our opinion, he did that was wrong, and then I am going to tell you a little bit later the evidence in support of it. [150]

My little talk to you this afternoon is going to be rather disjointed because I have to answer Mr. Rerat. I don't know what to say until he gets through, and so I have to go along with what he has to say.

First of all, we charge him with failure to keep a lookout, and what is the evidence on that? The evi-

dence is this. I asked Mr. Reiner, "Did you look out at all?" He said, "No." He failed to turn on the windshield wipers, and they were there. He said he couldn't see out, but Mr. Moore could see out. When he turned the headlight on bright before, Mr. Reiner told him to turn it on dim. He failed to stop the train by using the emergency bell. He failed to warn the engineer.

You might say that he had nothing to do with this at all, but the buzzer was there, and he had used it before. Now regardless of all the testimony brought in by the other witnesses of the plaintiff that Mr. Reiner had nothing to do with and couldn't handle a single gadget, he admitted that he had used the buzzer before, and Mr. Bray had seen him use it.

He failed to assume control, and I will come to his duties in a moment. He directed the hostler-helper—that is Mr. Moore—to turn the big headlight from bright to dim, and both Mr. Bray and Mr. Moore say that is true. [151]

He jumped from the diesel unit when there was no justification or excuse therefor.

Outside of being maybe shaken up, Mr. Bray and Mr. Moore were not hurt in the accident. Mr. Reiner was hurt when he jumped, and he was not hurt in the collision.

I refer you to the statement that was obtained from him, which bears the witnessing signature of his Brotherhood representative, and Mr. Reiner did not tell you that there was one single sentence in there that was not true, and it is right in here, "I got hurt when I jumped."

There are two complaints in this case, one of an earlier case and the present case, and both of them have been verified under oath, and Mr. Reiner makes the allegations in each one of those that he jumped and he got hurt when he jumped.

“I was following the provisions of Rules 106 and 108.” You have the rule book. You determine that. We charge that he failed to turn the bright beam of the rear headlight of the diesel unit. That is the same thing as to tell him to turn it on dim.

Counsel has made heated references to the Federal Employers Liability Act. All that means is that if a railroad negligently causes a man to be hurt they ought to pay him for damages, that is all, and there isn't anything different than that. It does not mean that we owe everything. It [152] doesn't mean that we owe these fantastic claims that have been built up by two times two equals four, times a hundred, and then you can come out with any kind of figures, as much as you want. It means if the railroad causes a man to be hurt they compensate him for his injuries. If he participates in it, his injuries and damages are depreciated, cut down, to the extent of his participation, and that is all that it means.

Another facet of counsel's argument about he “didn't see the red and the green light of the switch stand,” these are the facts because Mr. Reiner said so, and I will take his word for it because I think he is the only one who testified to it, that they stopped twelve to fourteen car lengths back over from the accident point. Then we know that the train crossed.

Then we know that they started up on the backward movement. They were down there four or five minutes. Do you recall that, and I asked Mr. Reiner how long. Then I refreshed his memory, and he said maybe four or five minutes, maybe less. Then they started up, and they make the accusation that that light was red or green or whatever it was, and they should have seen it, but Mr. Reiner didn't even look because I asked him, "Did you look, keep a look-out?" He said, "No."

Moore is accused of not having any instructions about telling Mr. Reiner what was going on. The engineer told him [153] what to do. He went up there, and he told Mr. Reiner what the movement was going to be, which fact Mr. Reiner admitted, and he said, "He didn't have to tell me. He knew I would do it."

The impassioned plea is also made again that Mr. Reiner cannot work. Now, these are the facts, that after 35 years of service with the company he has taken his pension. He has his house trailer, and he loves to go hunting and fishing in the outdoors. Certainly, that is a laudable purpose, and that is something perhaps every man would like to do, but the incentive for his working is gone. He can do now what he wants to do, and the evidence of this case is that he has done that. He has gone deer hunting, and it is not a spur of the moment thing because in last March he got his hunting license, and he fishes regularly in the fishing derby and the salmon derby. Those of you who have ever caught a

salmon, you may know that a person with a bad back cannot fight and land a 31-pound salmon.

We are criticized because we did not call the engineer. Mr. Rerat has subpoena power. Certainly, he could go down and get any employee of the Terminal Company he wants, and he got some others, none on the train crew, none who were there at the time with the exception of one fellow that was on the other train. Doesn't that sword cut both ways? [154] If he wanted the engineer, he could have had him here if he was available, and he knows why he was not called as well as I do.

Now, about Dr. Mundal, he was not called because he is not a surgeon, and he did not perform the operation, that is why, and if Dr. Mundal had anything to say different that Dr. McMurray they certainly would have had him here.

They talk about the man's heavy work, but bear in mind this, that Dr. Carlson in 1953 knew that he had this back, and he told you that with that back as it was in 1953 he was bound to have trouble with it.

Here is another thing. The plaintiff told Dr. Carlson that he had hurt his back lifting something and that his back had been bothering him, and did Mr. Reiner deny that? Did he say, "No, I didn't tell Dr. Carlson that I had hurt my back?" No, because it was true. This man had a back that had been bothering him for a long time, and he was operated on it—and what he was operated on for was the same thing that he had been bothered with before, and that was that unstable vertebra which Dr. Carl-

son pointed out on the X-ray and said, "Here it is," and that, "I would think, assume, and have an opinion that that back as it was then would have given him trouble if he had gone on doing heavy work." [155]

What is the responsibility of the plaintiff in this movement? His obligation was to protect the end. He had an obligation to exercise, and as even one of the witnesses that were called against us said, he pilots the train. What did he do? He did nothing whatsoever. He didn't even look out to see what was down there.

Now, we have seen in this case claims for large sums of money. We have seen in this case claims for all the experts. We have seen claims for injury, and whether or not those claims are made in good faith, whether they are really sincere, let me read from a complaint filed in this court on April 4, 1956, which Exhibit No. 31. I am reading Paragraph 7:

"That in an effort to relieve and heal himself of said injuries plaintiff has been compelled to expend a considerable sum of money for medical, hospital, nursing care, etc., and in the future will be compelled to spend a considerable sum of money for said purposes, the exact amount of which cannot be definitely determined at this time."

Again in another complaint filed in this court in October 31, 1956, we have this language, the same thing, that he has expended considerable sums of money, which is absolutely not true at all. There is no testimony in this case that Mr. Reiner at any time has paid or has become obligated to pay for

any treatment that he has ever received, [156] even going back to 1953.

Now, is that—do they come before you here with a legitimate? “I sprained my back when I jumped.” How much is that worth?

Now, another thing, and I am going to talk to you a little about, a little bit more about that because I know Mr. Rerat is probably waiting for me to comment about it, and that is this: We are going to be criticized because we had motion pictures taken of Mr. Reiner. We are going to be criticized for that. I am going to say to you that the reason it was done was to fight fire with fire, to protect ourselves so that this matter could be fairly and honestly above-board placed in front of you and each one of you twelve people see what the net result is, what the score is going to be; fight fire with fire.

Is there some reason why we have had one, two lawyers from Minneapolis, one from Seattle, one from Portland trying this case for the plaintiff with large photographs, aerial views, blown-up things like those claims in a complaint for considerable sums of money, for doctor and hospital bills when there is no justification or reason for it?

Mr. Rerat: Just a minute, Counsel. I want to object to such testimony on the grounds it is prejudicial, your Honor, and ask that the Jury be instructed to disregard it.

The Court: Proceed. [157]

Mr. Gearin: Now, you note the drawing of the tracks is given. Why is it that this case has to be built up in that manner with two aerial photographs

which we all know they don't come by easily. Can't we have a photograph of the wreck out there? Why do we have to have one of this big—they are exaggerated, you can see.

Now, I am going to talk very briefly about Dr. McMurray. Sometimes these things slip, and one of them is this. You recall Dr. McMurray said that when the plaintiff came in his office he walked perfectly. He used the word, something about ambulatory. Do you recall that? And he said he walked perfectly. Has the plaintiff today, has the plaintiff yesterday walked perfectly? Has he walked in the same manner as he walked in the motion pictures that were shown to you that were taken a few weeks ago on the times when we had the photographer-investigator go out?

About Dr. McMurray. They say why didn't—we didn't know until yesterday until I asked Mr. Reiner who he had been to for examination that they sent him all the way up to Seattle to have a doctor examine him there, just look at him, not treat him. Does that indicate that perhaps this is an idea, some idea to build this thing up to proportions which it does not deserve? [158]

Dr. Cohen, Dr. Grossman, and who else, and it was not until last week by shopping around they finally found a doctor who would come before this jury and say this man is hurt. That is why, and I think the obligation is upon Mr. Rerat to explain to the Jury why they had to shop around to find a doctor when they didn't call the one in Seattle, they

didn't call the second one, they didn't call the third one, and; finally, only last week did they find one.

Dr. McMurray told you that there was movement, and he says you could detect it by superimposing the radiographs one upon the other. Did Dr. McMurray compare those pictures, set it up and said, "We will take one and we will put it on top of the other, and we will show you what I mean that there is a movement"? Now, he didn't, but Dr. Carlson did, and you will have those X-rays with you. You take a look at them and see which doctor's testimony is worthy of belief. If Dr. McMurray could have demonstrated in those X-rays any movement in that man's low back, he would have done so. He preferred not to do so. He didn't want to put one on top of the other because it would prove to the contrary. Dr. Carlson did so.

What is involved in this case? It involves a case where one train's rearend backs and runs into another train. Somebody certainly was off base. Somebody certainly made a mistake here. They were doing something they should not [159] have done, but Mr. Reiner was the one who was piloting. He pilots trains. That's what they say. He was back there. He was in charge, according to Mr. Moore. They were back there talking. He should bear the responsibility of his failure to look out, for his failure to guard the rear end, failure to act as a reasonably prudent person. He is in it as well as anybody else.

Now, so far as injuries are concerned, we have this situation: We have a man who two years before the

accident had got a bad back. That is not disputed. He had something. The doctor would think that he probably would have trouble in the future. He was wearing a brace, and he had worn it for a long time. This is before the accident. All right, what happened? In the accident it flared up. Of course, he jumped and probably hurt his back at the time, but when he got through he had nothing more than what he had when he started, and that was the net result of the operation. Dr. Carlson told you that he anticipated the man could go back to doing the kind of work he could do before if his back had been stabilized, after his back was stabilized, and why did he stabilize that back, fuse it? It is to prevent the motion which made it unstable. It was unstable before this accident.

I have perhaps talked too long. I have tried not to. You have been on juries for a long period of times. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people [160] who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think in fairness that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you.

[Endorsed]: Filed February 21, 1957. [161]

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Oct. 31—Filed complaint.

Oct. 31—Issued summons to marshal.

Nov. 5—Filed summons with marshal's return.

Nov. 7—Filed answer.

Dec. 3—Entered order setting for trial on Jan. 22,
1957.

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Jan. 16—Entered order cancelling trial date of Jan.
22nd and resetting to Jan. 21st and as-
signing to Judge Mathes.

Jan. 18—Issued subpoena and 4 copies to attorneys
for plaintiff.

Jan. 18—Filed petition for subpoena duces tecum.

Jan. 18—Filed and entered order for subpoena
duces tecum. Issued to marshal.

Jan. 21—Issued subpoena and 2 copies to attorneys
for defendant.

Jan. 21—Filed supplement to complaint.

Jan. 18—Pretrial conf. had. Order allowing special
admission of Eugene Rerat for this case.

Jan. 18—Entered order allowing plaintiff's motion
to amend complaint.

Jan. 21—Jury empaneled and sworn. Record of
jury trial, evidence adduced. Entered
order denying plaintiff's motion to strike
portion of oral testimony.

Jan. 22—Record of further jury trial. Evidence ad-
duced.

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- Jan. 23—Record of further jury trial. Jury instructed and retire at 10:17 a.m. Entered order that the court's instructions be filed and sent to the jury. Entered order for jury meals. Jury returns with verdict 3:32 p.m. Entered order to file and enter verdict as returned for defendant and to enter judgment on the verdict with costs to defendant.
- Jan. 23—Filed jury's request for court's instructions.
- Jan. 23—Filed court's instructions.
- Jan. 23—Filed and entered verdict for deft.
- Jan. 23—Entered judgment on the verdict with costs for deft.
- Jan. 30—Filed motion for new trial.
- Feb. 11—Entered order setting hearing on ptff's motion for a new trial for Feb. 21, 1957, 10:00 a.m.
- Feb. 21—Filed partial transcript.
- Feb. 21—Record of hearing on motion for new trial. Motion taken under advisement. Entered order allowing pltf. 15 days in which to file memo from date of receiving completed transcript and allowing deft. 10 days thereafter.
- May 31—Filed plaintiff's memorandum in support of motion for new trial.
- May 31—Filed reporter's partial transcript.
- June 14—Mailed file and reporter's transcript to Judge Mathes.

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- June 12—Filed brief of Northern Pacific Terminal Co.
- June 24—Filed and entered order denying ptffs. motion for a new trial and ordering Clerk to mail copies of order to attorneys.
- July 16—Filed notice of appeal.
- July 16—Filed cost bond on appeal.
- July 16—Filed plaintiff's designation of contents of record.
- July 16—Filed plaintiff's statements of points.
- July 16—Filed motion for transmittal of original exhibits.
- July 16—Filed appellee's designation of additional portions of record, etc.
- July 17—Filed affidavit of service of notice of appeal, etc.
- July 25—Filed and entered order for transfer of Exhibits Nos. 1, 5, 13, 21.
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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Supplemental complaint; Motion to strike portion of oral testimony of Frank Reiner, etc.; Verdict; Order to enter verdict as returned for defendant and Order to enter judgment on the verdict for defendant with costs; Motion for new

trial; Order on plaintiff's motion for a new trial; Notice of appeal; Cost bond on appeal; Plaintiff's statement of points; Plaintiff's designation of contents of record on appeal; Appellee's designation of additional portions of the record, etc.; Order for transmittal of original exhibits and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8874, in which Frank Reiner is the plaintiff and appellant and Northern Pacific Terminal Company of Oregon is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of this court.

I further certify that the reporter's transcript of proceedings will be forwarded at a later date. All exhibits are being forwarded by O'Neill Transfer Company.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 9th day of August, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15677. United States Court of Appeals for the Ninth Circuit. Frank Reiner, Appellant, vs. Northern Pacific Terminal Company of Oregon, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 10, 1957.

Docketed August 21, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.